

THE LAW AND POLITICAL ECONOMY OF CONTEMPORARY FOOD:

SOME REFLECTIONS ON THE LOCAL AND THE SMALL

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I INTRODUCTION

This article explores how ideas of size and scale function as categories of legal analysis when food provisioning is at stake. Debates about how food is produced and distributed are fundamentally debates about the structure of economic exchange and thus are also often debates about the legal rules that govern markets. At different moments in American legal thought, reformers have deployed arguments about the size of market enterprise and the scale of economic exchange in order to advocate for decentralized, democratic, and small-scale socioeconomic relations. And they have actively recruited law to advance their particular political-economic visions. This article asks how similar ideas of size and scale motivate actors today who wish to create alternative forms of capitalist food production and exchange—and why these ideas have had comparatively less engagement with law.

Like other contributors to this symposium on contemporary legal thought, I follow Duncan Kennedy's map in order to make sense of our contemporary legal moment—as well as to trace changes in the legal categories governing food markets over time. Kennedy distinguishes among three modes of legal thought that spread throughout the West and elsewhere between 1850 and 2000: classical legal thought, social legal thought, and contemporary legal thought.¹ Because I am interested in the intersection of law and food, I add a parallel map to Kennedy's schema—namely, Harriet Friedmann and Philip McMichael's

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1. See generally Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 19 (David M. Trubek & Alvaro Santos eds., 2006).

studies of “food regimes.”² Friedmann and McMichael describe three global shifts in the structure of agricultural production and trade that roughly parallel Kennedy’s historical periodization. By linking legal categories to categories of food production and distribution, I illustrate how the temporal changes that Friedmann and McMichael identify in food markets are made intelligible (even possible) by changes in modes of legal thought.

But analyzing how law influences food is a one-sided frame. Also motivating this article is the more dynamic idea that law and food are both good to think with as contemporary objects and instruments of social and economic change. Here, briefly, is what I mean. As Kennedy describes it, each mode of legal thought is not a political ideology but rather a “consciousness” or “language.”³ That is, modes of legal thought are temporally bounded epistemic perspectives that—in different ways in different historical periods—provide the vocabulary through which numerous kinds of regulations, judicial cases, social and economic programs, and justificatory arguments are articulated.⁴ Imprinted in Kennedy’s legal categories, then, are enduring cultural logics about the market, the state, and economic development. Claude Lévi-Strauss famously argued that food works in similar ways. “[T]he cooking of a society,” he wrote, “is a language in which it unconsciously translates its structure—or else resigns itself, still unconsciously, to revealing its contradictions.”⁵ That is, the production, provisioning, and cooking of food likewise encode basic human attitudes about the market, the state, law, technology, and sociocultural relations. As such, changes in the language of food—like changes in the language of law—reflect and require changes in these and other overlapping systems.⁶ Thus I begin this article by describing how different modes of legal thought shape food systems and enable their transformations. But I end by asking what contemporary food movements reveal about the possibilities and limits of contemporary law.

Contemporary food movements have revived arguments about scale and size, and more specifically about the local and the small, as representations for ideas about desirable forms of market exchange—ideas that were once more familiar in law. In the early part of the period that Kennedy calls social legal thought, size and scale were salient legal categories of production and distribution linked to questions of political economy. In the face of mass industrialization, progressive legal reformers used these categories to demand decentralization and the diffusion of power in the market as much as in the

2. See Harriet Friedmann & Philip McMichael, *Agriculture and the State System: The Rise and Decline of National Agricultures, 1870 to the Present*, 29 *SOCIOLOGICA RURALIS* 93 (1989). Friedmann and McMichael developed their food-regime analysis through a series of articles that, in turn, generated a great deal of secondary literature. For one example see the special issue, *Symposium on Food Regime Analysis*, 26 *AGRIC. & HUM. VALUES* 261 (2009).

3. Kennedy, *supra* note 1, at 23.

4. See *id.*

5. Claude Lévi-Strauss, *The Culinary Triangle*, in *FOOD AND CULTURE: A READER* 28, 35 (Carole Counihan & Penny Van Esterik eds., 1997).

6. My thanks to Harry West for this observation.

state. These demands for economic democracy have had a renaissance in food—but not in law. Today, progressive legal scholars are revitalizing efforts to democratize state institutions by expanding stakeholder participation in lawmaking and public life. But unlike their predecessors, contemporary legal scholars rarely suggest that decentralized publics should be empowered to regulate local economic conditions or that political citizenship requires a measure of market deconcentration to enable the democratic self-governance of economic life.

To illustrate this point, the second part of this article examines democratic experimentalism—an influential decentralist legal reform movement that owes a great deal to the work of Charles Sabel. In the 1980s, Sabel argued extensively for decentralized, flexible, and relatively egalitarian forms of economic production—arguments that rural sociologists today draw upon as a model for agricultural reform.⁷ By contrast, for legal scholars, democratic experimentalism now stands for a different aim: namely, to import existing forms of flexible specialization from the market to restructure the institutions of the state. As we shall see, the political-economic aspirations limned by Sabel in his early work mostly vanished as democratic experimentalism became a project of contemporary legal reform.

The third and final part of this article offers two examples of actors that are revitalizing arguments about smallholder production, local democracy, and market exchange: artisanal raw-milk cheese producers and fair trade activists. These movements share features in common with Sabel's early work and with social-era ideas of political-economic deconcentration. For the most part, however, they have an uneasy and ambivalent relationship to contemporary law. I argue that for both analysts of law and food this gap is productive to think with.

II

FOOD REGIMES AND LEGAL THOUGHT

This part retells Kennedy's story of the globalization of law alongside Friedmann's and McMichael's story of the globalization of food. Although all of these scholars write from a transnational perspective, I focus my redescription on the United States because I am interested in what studying food movements illuminates about American law. In the amalgam that emerges, I pay particular attention to how different actors use law to challenge economic concentration and inequality in food systems, and how they use scale and size as progressive analytics to express ideas for market reform.

7. See generally MICHAEL J. PIORE & CHARLES F. SABEL, *THE SECOND INDUSTRIAL DIVIDE: POSSIBILITIES FOR PROSPERITY* (1984).

A. The First Food Regime, Classical Legal Thought, and the Rise of the Family-Scale Commercial Farm

Classical legal thought, which Kennedy dates between 1850 and 1914, governed the first food regime, which Friedmann and McMichael date between 1870 and 1914.⁸ Its defining feature was a period of economic liberalization that Friedmann and McMichael call the first “international system” of food trade.⁹ Classical jurists configured the market as a space of freedom, formal equality, and individual will that was governed by the private law of property and contract.¹⁰ They linked domestic free markets to the markets of other nation-states via private international law, which, Kennedy argues, was conceived as “conceptually identical” to private domestic law.¹¹ Classical legal thought thus facilitated the creation of world markets in food (which operated alongside older forms of colonial exchange).¹² These new markets promoted competitive trade between European and independent settler states for commodities such as wheat and meat that were based, for the first time, on world prices linked to the sterling gold standard.¹³

Intriguingly, the competitive advantage of settler states for commodities already produced in Europe depended on the rise of small-scale household agricultural production.¹⁴ In the United States in the late nineteenth century, the mechanization of harvesting machinery made family labor sufficient for a farm to specialize in wheat as a cash crop.¹⁵ Mechanization, combined with the wide availability of land and credit,¹⁶ placed household and “capitalist farms” (where landowners hired wage labor) in direct competition.¹⁷ Household farms—motivated more by survival than profit—undercut their capitalist competitors by lowering their own standards of living and consumption.¹⁸ And when world prices dropped after 1885, many large American wheat farms split into household units.¹⁹ European countries, in turn, purposefully undermined domestic food security by importing cheap wheat and other food produced by family farms in settler states in order to subsidize the growth of their own industrial working class.²⁰ Unpaid household labor in the United States and

8. Friedmann & McMichael, *supra* note 2, at 95; Kennedy, *supra* note 1, at 21.

9. Friedmann & McMichael, *supra* note 2, at 95–96 (emphasis original).

10. Kennedy, *supra* note 1, at 25–26.

11. *Id.* at 34–35.

12. See Friedmann & McMichael, *supra* note 2, at 96, 100.

13. See *id.* at 99–100, 102; Harriet Friedmann, *The Political Economy of Food: The Rise and Fall of the Postwar International Food Order*, 88 AM. J. SOC. S248, S256–57 (Supp.1982).

14. Friedmann & McMichael, *supra* note 2, at 95, 100–01.

15. Harriet Friedmann, *World Market, State, and Family Farm: Social Bases of Household Production in the Era of Wage Labor*, 20 COMP. STUD. SOC'Y & HIST. 545, 551 (1978).

16. In 1862, Congress passed the Homestead Act making land grants available to individuals. Homestead Act of 1862, ch. 75, 12 Stat. 392 (repealed 1976).

17. Friedmann, *supra* note 15, at 551, 554, 564–71.

18. *Id.* at 568.

19. *Id.* at 574.

20. See Harriet Friedmann, *From Colonialism to Green Capitalism: Social Movements and*

elsewhere thus “underwrote the developing [industrial] wage-relation and attendant growth of food markets.”²¹

Small-scale family wheat production thus consolidated in U.S. agriculture around the same time that many other workers shifted from household to industrial wage labor—a shift that was also facilitated by legal reform.²² During the classical period, the law of the market separated from the law of the household as legal ideas such as self-ownership and the sale of labor power replaced an earlier legal regime based on “duties of obedience” and “rights to support” in the home.²³ What emerged as a result of this new legal and social configuration was “classes of family farmers, which had never existed in history”: what Friedmann calls “the fully commercial farm based on family labor.”²⁴ These family farmers could no longer survive based on subsistence household production. Rather, they became full-fledged market actors who increasingly specialized in single cash crops and employed early forms of industrialization—buying industrial inputs and selling raw materials for simple forms of industrial processing.²⁵ And they depended upon export markets, international free trade, and world prices for their survival.²⁶

Small-scale American farmers’ increasing participation in world markets was accompanied by active, at times even explosive, participation in political life.²⁷ Farmers organized not only around their class interests—protesting, for example, rising costs for industrial inputs and low world-market prices—but more broadly around questions of political economy.²⁸ They leveled criticisms at American banking, monetary, taxation, and election policy, and in doing so expressed their general distrust of centralized public and private power.²⁹ Grant McConnell thus describes this period, which peaked in the 1890s with Populist

Emergence of Food Regimes, in NEW DIRECTIONS IN THE SOCIOLOGY OF GLOBAL DEVELOPMENT 227, 234–36 (Frederick H. Buttle & Philip McMichael eds., 2005). Indeed, wheat imports to Europe “almost sextupled between 1870 and 1929.” Friedmann, *supra* note 13, at S257.

21. Friedmann & McMichael, *supra* note 2, at 95. I should add: the United States was one of several export settler states. Friedmann, *supra* note 20, at 237.

22. New industries, such as mills and factories, had removed significant forms of economic production to a space outside the household. See, e.g., ALAN DAWLEY, CLASS AND COMMUNITY: THE INDUSTRIAL REVOLUTION IN LYNN 77, 131, 224 (1976); MARY P. RYAN, CRADLE OF THE MIDDLE CLASS 64–65 (1981); JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC 52–53 (2004).

23. Janet Halley, *What is Family Law? A Genealogy, Part I*, 23 YALE J.L. & HUMAN. 1, 2–4 (2011); Kennedy, *supra* note 1, at 35.

24. Friedmann, *supra* note 20, at 235–36.

25. Friedmann & McMichael, *supra* note 2, at 100, 102.

26. Friedmann, *supra* note 20, at 235–36.

27. See GRANT MCCONNELL, THE DECLINE OF AGRARIAN DEMOCRACY 5 (1953). See also LAWRENCE GOODWYN, THE POPULIST MOMENT: A SHORT HISTORY OF THE AGRARIAN REVOLT IN AMERICA (1978); THOMAS H. GREER, AMERICAN SOCIAL REFORM MOVEMENTS: THEIR PATTERN SINCE 1865 (1980) (chapter 3: “Farmers in Revolt”); JOHN D. HICKS, THE POPULIST REVOLT: A HISTORY OF THE FARMERS’ ALLIANCE AND THE PEOPLE’S PARTY (1959).

28. MCCONNELL, *supra* note 27, at 5, 7.

29. *Id.* at 5. Still, as Greer explains, the “Agrarian Crusade” did not aim to “overthrow the existing economic, social, or political system” but instead demanded reform in the interests of the “producing” classes against “the banking–manufacturing” industrial sector. GREER, *supra* note 27, at 61.

party politics, as one of “agrarian democracy,” a term he uses to capture the political dimensions of farmers’ aspirations for market reform.³⁰ For example, the National Grange, which organized against monopolists and middlemen, called for “a proper equality, equity and fairness” as “the very essence of American independence.”³¹ These late-nineteenth-century agrarian demands—articulated in the language of “equality and freedom”³²—represent what Kennedy calls lay instantiations of classical legal thought.³³ Will theory, Kennedy observes, was “highly manipulable.”³⁴ Agrarians, for example, could claim that “bargains under capitalism did not represent ‘free will’” or that the state had impermissibly interfered in the free market to privilege the interests of industrial corporations and other large capitalists.³⁵ Indeed, Lawrence Goodwyn argues that farmers of this era catalyzed “the largest democratic mass movement in American history.”³⁶ The first food regime thus contained within it a powerful populist democratic critique of food (and other) markets articulated via the rhetorical tools of classical legal thought.

B. The Second Food Regime, the Social, and Market Consolidation

The social period, which Kennedy dates between 1900 and 1968, grew out of legal reforms designed to mitigate the inequalities and conflicts of classical legal thought as well as the rising social unrest articulated within it.³⁷ Agrarian protest subsided after the turn of the century in part due to higher market prices that held steady until World War I.³⁸ But when world prices for wheat fell by two-thirds between 1925 and 1935, American family farmers were especially vulnerable.³⁹ They responded by growing more crops (perhaps because of their household structure).⁴⁰ And during the Great Depression, highly indebted, impoverished farmers and “unsalable wheat stocks coexisted with hungry people.”⁴¹ By the 1930s, farmers had organized into formidable coalitions to demand legal protection from domestic and international markets.⁴² Congress

30. See MCCONNELL, *supra* note 27, at 3–9.

31. *Id.* at 6.

32. *Id.* at 8.

33. See Kennedy, *supra* note 1, at 27.

34. *Id.*

35. *Id.* at 27–28.

36. See GOODWYN, *supra* note 27, at VII.

37. Kennedy, *supra* note 1, at 21, 37–38.

38. MCCONNELL, *supra* note 27, at 11.

39. Friedmann, *supra* note 15, at 546.

40. Friedmann, *supra* note 20, at 237.

41. *Id.* at 238.

42. See, e.g., GREER, *supra* note 27, at ch. 7 (“Agriculture’s Modern Front”); Richard S. Kirkendall, *The New Deal and Agriculture*, in *THE NEW DEAL: THE NATIONAL LEVEL* 83, 85–96 (John Braeman et al. eds., 1975) (describing farm strikes and protests in the early 1930s). Organized farm lobbies had some success in the early 1920s securing legislative reform. For example, in 1921, the Packers and Stockyards Act, ch. 64, 42 Stat. 159, prohibited packers from colluding in the purchase of livestock. A year later, the Capper-Volstead Act of 1922, ch. 57, 42 Stat. 388, limited antitrust liability for farmers who wished to collectively market their products. See GREER, *supra* note 27, at 224–25.

responded with preferential measures ushering in what Friedmann and McMichael call the second food regime—one based on state-managed agriculture rather than free trade.⁴³

Crucially, in the social period, law itself was reconfigured. Classical jurists understood law as a formal deductive technique; for them, the aim of legal reasoning was to enable individuals (and states) to “realize their wills, restrained only as necessary to permit others to do the same.”⁴⁴ By contrast, social judges, administrators, and legislators reasoned instrumentally “from the social ‘is’ to the adaptive ought for law.”⁴⁵ They eroded the classical distinction between the public and private and refashioned law into an expansive and purposive tool of intervention: “a regulatory mechanism that could and should facilitate the evolution of social life in accordance with ever greater perceived social interdependence at every level, from the family to the world of nations.”⁴⁶

The “social people,” as Kennedy calls them, also rejected the two exclusive categories of classical legal analysis: rights-bearing individuals and the nation-state.⁴⁷ They instead embraced a corporatist idea of society comprised of plural institutions “below and above the level of the state” as well as of organized groups “between the level of the individual and people” with access to state power.⁴⁸ To that end, legal interventions were often designed to protect the aggregate interests of various economic groups—such as farmers and workers. Moreover, in social fashion, these interventions often did not grant new legal rights but rather created new legal and administrative welfarist regimes.⁴⁹

What this meant for American agriculture was a series of New Deal-era reforms designed in the class interests of (ultimately larger and certainly landed) farmers. State planners identified overproduction as the core problem driving down prices in agricultural markets.⁵⁰ The Agricultural Adjustment Act of 1933 aimed to raise farm incomes by compensating farmers who reduced the number of acres they devoted to wheat and other basic crops.⁵¹ To maintain target prices, the government purchased crops via the Commodity Credit Corporation (CCC). The CCC, also created in 1933, issued loans at a

43. Friedmann & McMichael, *supra* note 2, at 103.

44. Kennedy, *supra* note 1, at 26.

45. *Id.* at 40.

46. *Id.* at 22.

47. *See id.* at 42.

48. *Id.* at 40–42.

49. *See* Kennedy, *supra* note 1, at 65–66 (explaining that “the general concept of a right” had “its historical low point in the 1930s (heyday of right and left versions of the social)”).

50. Kirkendall, *supra* note 42, at 87.

51. The Agricultural Adjustment Act of 1933, Pub. L. No. 73-10, 48 Stat. 31. It was struck down by the Supreme Court in 1936 on the grounds that Congress was not empowered to tax agricultural processors and use the payments to raise farmer incomes. *See* *United States v. Butler*, 297 U.S. 1 (1936). But the Act was mostly reissued with its core provisions for production controls intact (and upheld) as the Agricultural Adjustment Act of 1938, Pub. L. No. 75-430, 52 Stat. 31 (current version at 7 U.S.C. § 1281 (2012)). For details, see Harold F. Breimyer, *Agricultural Philosophies and Policies in the New Deal*, 68 MINN. L. REV. 333, 342–44, 349–51 (1983).

specifically calculated rate that functioned as a minimum price (and thus effectively as a price subsidy); when market prices fell below this rate, the government took title to the commodities.⁵² The government rather quickly accumulated very large stocks of grain notwithstanding its efforts to encourage voluntary production controls.⁵³

The second food regime, which consolidated after World War II, was defined by the efforts of the United States to manage its oversupply of wheat.⁵⁴ Key to this regime was the newly established Bretton Woods international monetary system, designed to foster international interdependence and trade through stable exchange rates.⁵⁵ Because this system tied world currencies to the U.S. dollar, the United States created an export subsidy when it decided to sell wheat abroad in negotiated prices in the currency of the importing nation (which typically lacked foreign exchange).⁵⁶ It cleverly named this policy “food aid” and began exporting wheat first to postwar Europe,⁵⁷ and then to developing countries via the Agricultural Trade Development and Assistance Act of 1954, more commonly known as Public Law 480.⁵⁸

Between 1956 and 1965, American food aid comprised a stunning one-third of world trade in wheat.⁵⁹ Food aid enabled the United States to protect its own domestic producers while cultivating Cold War allies among former colonies—many of which were agrarian societies self-sufficient in food grains but would soon come to rely on global markets for wheat.⁶⁰ Third World governments embraced subsidized imports of grain to undercut their own domestic agricultural sectors in a drive towards industrialization.⁶¹ During the social period, the role of national food provisioning was thus as McMichael argues: “to subsidize, simultaneously, the First World social contract and Third World urban-industrial development.”⁶² But because American domestic subsidies, combined with massive subsidized exports, kept world prices low,⁶³ small American farmers did not benefit nearly as much as large ones, and during the social period “the number of farmers had fallen to a tiny percentage of the

52. Friedmann, *supra* note 13, at S258; Friedmann, *supra* note 24, at 239; *see also* Breimyer, *supra* note 51, at 346–47.

53. Friedmann, *supra* note 13, at S258.

54. For a detailed description, *see id.*

55. *See* Kennedy, *supra* note 1, at 57–58.

56. Friedmann, *supra* note 13, at S259, S262–63.

57. Friedmann, *supra* note 20, at 241; Friedman, *supra* note 13, at S260–61.

58. Friedmann, *supra* note 13, at S261–62. *See* Agricultural Trade Development and Assistance Act of 1954, Pub. L. No. 83-480, Tit. 1, 68 Stat. 454, 455–57 (codified as amended at 7 U.S.C. § 1691 (2008)). By 1956, half of U.S. economic aid was food aid. Friedmann, *supra* note 13, at S262.

59. More precisely, 31.8 percent between 1956 and 1960 and 35.6 percent between 1961 and 1965. Friedmann, *supra* note 13, at S264.

60. *Id.* at S259; Friedmann, *supra* note 20, at 241–42.

61. Friedmann, *supra* note 13, at S267–69; Friedmann & McMichael, *supra* note 2, at 104.

62. Philip McMichael, *Global Development and the Corporate Food Regime*, in *NEW DIRECTIONS IN THE SOCIOLOGY OF GLOBAL DEVELOPMENT*, *supra* note 20, at 272.

63. Friedmann, *supra* note 13, at S266.

population because of the very success of the regime.”⁶⁴

The second food regime also witnessed intensive industrialization of agriculture and meat production in the United States as food became an increasingly manufactured product sold by corporate retail chains.⁶⁵ Industrialization helped to “renationalize” foods that the United States had previously imported from former colonies. For example, large food-processing corporations replaced sugar with chemical sweeteners and domestic corn products, and they replaced temperate and tropical oils with domestic soy.⁶⁶ The postwar social period thus “framed the emergence of a number of giant agrofood capitals, which eventually became powerful actors, whose interests diverged from both farmers and national states.”⁶⁷ Indeed, what began as a legal regime that included a measure of domestic protection for smaller family-scale farmers ended with the consolidation of large agribusiness corporations anxious to escape the regulatory controls of social law.

C. Size and Scale as Representations of Decentralization and Democratic Self-Government in Social Law

In retrospect, America’s path towards large-scale industrialized agriculture is unsurprising. As Kennedy writes, the social after World War II was Keynesian.⁶⁸ Keynesian policies of economic recovery required an economy of mass consumption and production and, in turn, state regulations (such as the Agricultural Adjustment Act) designed to stabilize mass markets. But, as others have argued, this path did not always appear inevitable,⁶⁹ and it was certainly not uncontested. In the 1930s, agrarians and other “decentralist intellectuals” attacked large-scale industrialization and big business as responsible for dispossessing small farmers, shopkeepers, and manufacturers, producing a propertyless class of workers and concentrating economic and political power.⁷⁰ Many of these decentralists represent what Kennedy describes as a particular progressive strand of the social preoccupied with “land reform, in the broadest sense, including the transformation of large into viable small properties, the agglomeration of minifundia into cooperatives, the abolition of tenure forms like sharecropping,” the creation of cooperative marketing boards and cooperative forms of agricultural finance.⁷¹ To that end, they criticized New

64. Friedmann, *supra* note 20, at 246. Friedmann explains that “[p]artly through success of support policies . . . the number of people working in agriculture fell by more than half between 1950 and 1972” from fifteen to five percent of the total population. Friedmann, *supra* note 13, at S274. But it was not just price supports that advantaged large farms: “industrialization of agriculture subordinated farmers to large agricultural input and food-processing firms.” Friedmann, *supra* note 24, at 246.

65. Friedmann & McMichael, *supra* note 2, at 103; Friedmann, *supra* note 20, at 240.

66. Friedmann & McMichael, *supra* note 2, at 109; Friedmann, *supra* note 20, at 244.

67. Friedmann, *supra* note 20, at 240.

68. Kennedy, *supra* note 1, at 57.

69. See generally PIRE & SABEL, *supra* note 7, and *infra* Part II.

70. Edward S. Shapiro, *Decentralist Intellectuals and the New Deal*, 58 J. AM. HIST. 938, 939 (1972).

71. Kennedy, *supra* note 1, at 55. This decentralist defense of rural America and small business also included conservative voices concerned with, for example, preserving rural-oriented religious

Deal reforms such as the Agricultural Adjustment Act for intensifying dependency on public support rather than fostering economic self-sufficiency through, for example, widespread property ownership and tenancy reform for (often minority) sharecroppers and the rural poor.⁷²

During the social period, it was not only lay or fringe thinkers but elite reformers, such as Louis Brandeis and John Dewey, who expressed arguments about the dangers of industrial consolidation and state planning. As legal historian William Forbath puts it:

What the Populists and labor radicals did for agrarian and working class movements, Progressive thinkers like Brandeis and John Dewey did for later middle-class and elite reformers: They interpreted the emergence of big business and corporate capitalism in terms of an inherited democratic constitutional tradition, and, in doing so, limned a vision for the future.⁷³

Because Brandeis features on Kennedy's map as an exemplary social jurist, it is worth pausing to examine a few of his more famous ideas.⁷⁴ Like other decentralist reformers of his time, Brandeis argued that the problem with market concentration was political—not simply economic. "Business," he explained, "may become as harmful to the community by excessive size, as by monopoly or the commonly recognized restraints of trade."⁷⁵ Big business requires a big state to regulate it—and both deprive citizens of opportunities for democratic participation at a scale meaningful for human development and self-rule.⁷⁶ Adolf Berle, Jr. summarized the point as follows: "There is [Brandeis's] passionate belief in the doctrine that men are entitled to fulfill themselves; hence democracy; hence the desire for preservation of local experimentation; hence the fear of the overmastering big combination; hence also the fear of an overmastering federal government."⁷⁷ Thus even as Brandeis supported federal regulation of corporations, he cautioned that "[t]he federal government must

morality and household structures. See Shapiro, *supra* note 70, at 940–41. Agrarians also split between those who favored racial equality and solidaristic class politics among poor rural blacks and whites and those who championed white supremacy. See PAUL K. CONKIN, *THE SOUTHERN AGRARIANS* 73, 100, 117 (1988).

72. Shapiro, *supra* note 70, at 942–44, 948, 951. These decentralists supported early New Deal measures like the Tennessee Valley Authority and the Rural Electrification Administration. *Id.* at 944. Alternative proposals for agrarian reforms also included state ownership of services such as railways and grain elevators and strengthening farmers' cooperatives. By contrast, the AAA's regime of production controls "resolved the farm crisis without violating the constraints of the industrial capitalist economy" or "challenging the position of dominant class interests within agriculture." Kenneth Finegold, *From Agrarianism to Adjustment: The Political Origins of New Deal Agricultural Policy*, 11 *POL. & SOC'Y* 1, 7–11, 25–27 (1982).

73. William E. Forbath, *Why is this Rights Talk Different From All Other Rights Talk? Demoting the Court and Reimagining the Constitution*, 46 *STAN. L. REV.* 1771, 1800 (1994).

74. Kennedy, *supra* note 1, at 47.

75. *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 574 (1933) (Brandeis, J., dissenting).

76. STEPHEN W. BASKERVILLE, *OF LAWS AND LIMITATIONS: AN INTELLECTUAL PORTRAIT OF LOUIS DEMBITZ BRANDEIS* 307–08, 325–26 (1994).

77. SAMUEL J. KONEFSKY, *THE LEGACY OF HOLMES AND BRANDEIS: A STUDY IN THE INFLUENCE OF IDEAS* 171 (1956) (quoting Adolf A. Berle, Jr., *The Way of an American*, 25 *SURV. GRAPHIC* 597 (1936)).

not become too big just as corporations should not be permitted to become too big. You must remember that it is the littleness of man that limits the size of things we can undertake.”⁷⁸

For Brandeis, this attention to human scale meant that the question of American democracy could not be confined to the realm of the political. “[S]ide by side with political democracy,” he argued, “comes industrial democracy.”⁷⁹ And “democracy,” he explained further, “demands . . . ‘distributing power’: consumer power, economic power, political power and the power of human creative development”⁸⁰—for example, forms of industrial organization that entitle workers to “not only a voice but a vote” and to meaningful participation in the management of their firms.⁸¹ He doubted the possibility of this sort of democratic self-governance unless states used their legislative power “to set a limit upon the size of corporate units” and thus to set a limit upon the “concentration of power.”⁸² To that end, Brandeis developed a social-era jurisprudence of market regulation that explicitly differentiated between the big and the small.

As an apt example of this jurisprudence, consider Brandeis’s efforts to curb the power of large retail chains. In the early twentieth century, classical jurists struck down efforts by states to limit department stores and later chain stores by, for example, issuing graduated licenses fees or taxes based on how many stores a single corporation owned and the extent of these stores’ geographical reach.⁸³ From a classical perspective, these sorts of legislative restrictions impermissibly interfered with the rights of all market actors to buy and sell on formally equal terms. According to Richard Schragger, the classical line of reasoning held steady in the judiciary throughout the 1920s, defeating anti-chain and anticorporate legislation (with Brandeis regularly dissenting).⁸⁴ In 1931, however, the Supreme Court, in *State Board of Tax Commissioners v. Jackson*, upheld a state tax on chain stores precisely by distinguishing between the ownership and organization of chains versus independent stores.⁸⁵ The Court supplied a number of social facts about the purchasing and management

78. BASKERVILLE, *supra* note 76, at 311 (quoting Brandeis).

79. LOUIS D. BRANDEIS, *THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS* 140–41 (Osmond K. Fraenkel ed., 1935).

80. BASKERVILLE, *supra* note 76, at 291 (quoting Brandeis).

81. *See* BRANDEIS, *supra* note 79, at 83.

82. *Id.* at 80.

83. For a fascinating and detailed account, see Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920–1940*, 90 IOWA L. REV. 1011, 1030–34 (2005).

84. *Id.*, at 1035–38. *See, e.g.,* Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389, 410–11 (1928) (Brandeis, J., dissenting) (“[T]here are still intelligent, informed, just-minded, and civilized persons who believe that the . . . evils incident to the accelerating absorption of business by corporations outweigh the benefits thereby secured; and that the process of absorption should be retarded.”).

85. *State Bd. of Tax Comm’rs v. Jackson*, 283 U.S. 527, 537–38 (1931). The case “was initially hailed by some opponents of the Lochner Court as a victory for Brandeis and Holmes.” Schragger, *supra* note 83, at 1040.

practices of chains to conclude that the state had drawn a qualitative distinction—and one that was legitimate to advance social welfare.⁸⁶

This decision generated a good deal of debate. But the terrain of the debate was shifting. Whereas dissenting justices rejected (in classical form) the legal salience of a distinction between chains and independent stores, describing them instead as formally equivalent market actors,⁸⁷ liberal New Dealers challenged the case on competing social welfarist and scalar grounds.⁸⁸ Charles Beard, for example, argued that the kind of large-scale, scientific, centralized state planning of production and industry envisioned by liberal New Deal reformers required large-scale, standardized systems of distribution: hence chains. In Beard's words, "Planned production without rationalized retailing is an impossibility."⁸⁹ And two years later, when litigants challenged a similar but more extensive antichain law before the Supreme Court, they attached Beard's argument to their brief.⁹⁰

This time the Court struck down the tax with Brandeis (as well as Stone and Cardozo) dissenting.⁹¹ Significantly, in an impassioned (forty-page) dissent, Brandeis not only justified the state's distinctions. He advocated for cooperatives as a viable economic alternative to retail chains (which, between 1933 and 1936, increased over twofold⁹²). "Americans seeking escape from corporate domination," Brandeis wrote,

have open to them under the Constitution another form of social and economic control. . . . They may prefer the way of co-operation, which leads directly to the freedom and the equality of opportunity which the Fourteenth Amendment aims to secure. That way is clearly open. For the fundamental difference between the capitalistic [corporate] enterprise and the co-operative—between economic absolutism and industrial democracy—is one which has been commonly accepted by Legislatures and the courts as justifying discrimination in both regulation and taxation.⁹³

That is, Brandeis urged states to view not only difference in size but also difference in social organization as reasonable grounds for discrimination.⁹⁴ And

86. See *Jackson*, 283 U.S. at 534–35, 541–42.

87. See *id.* at 544–45 (Sutherland, J., dissenting); see also Schragger, *supra* note 83, at 1039–40.

88. Schragger, *supra* note 83, at 1042–44.

89. Charles A. Beard, *Planning and Chain Stores*, NEW REPUBLIC, Nov. 30, 1932, at 66.

90. See *id.* In *Jackson*, state legislation had distinguished between the ownership and management structure of chain stores versus independent stores, taxing chains based on the number stores under single ownership. *Jackson*, 283 U.S. at 530–33. In *Liggett*, state legislation also increased license fees based on the number of different counties that chain stores occupied—a scalar classification the majority found unreasonable. *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 528–30, 533–34 (1933).

91. *Liggett*, 288 U.S. at 532–35.

92. LIZABETH COHEN, *A CONSUMER'S REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA* 25 (2003). That said, cooperatives remained marginal in the United States; they never accounted for more than 1.5 percent of national retail sales. *Id.*

93. *Liggett*, 288 U.S. at 579. (Brandeis, J., dissenting) (footnotes omitted). See also BASKERVILLE, *supra* note 76, at 298–301.

94. Brandeis wrote at length about the dangers of excessive size in *Liggett*—which “alone,” he argued, “gives to giant corporations a social significance not attached ordinarily to smaller units of private enterprise.” *Liggett*, 288 U.S. at 565–66. (Brandeis, J., dissenting).

he encouraged them to use their lawmaking power to favor economic activity organized through decentralized and democratic forms of control.

At issue, then, in this case were competing ideals of the social good. Brandeis articulated a decentralist vision of political economy that he attempted to inscribe into law. But it lost—rather quickly—to a competing liberal ideology about the optimal size and scale of the market and the state. This competing ideology—based on the values of centralized, rationalized, and scientific management suggested by Beard above—counseled planners to stabilize the economy by working with, rather than against, big business and mass production.⁹⁵ Thus, for example, the National Industrial Recovery Act limited antitrust liability precisely in order to enable firms to combine in ways that would facilitate industry-wide state planning.⁹⁶ Although the Act was declared unconstitutional shortly after it was enacted,⁹⁷ the working partnership it suggested between corporations and the state became the liberal governing consensus of the late New Deal (legitimated, for those on the left, by collective bargaining).⁹⁸ By the end of 1930s, the New Deal coalition, especially the executive branch, “came to represent centralization, bureaucratization, and a new kind of urban liberalism sharply distinct from the older Progressivism.”⁹⁹ And public administrative agencies adopted the centralized and hierarchical organization of the mass corporation that they were tasked with facilitating and regulating.¹⁰⁰

I should make clear: this 1930s liberal embrace of bigness as a strategy of economic and political reform is related to, but not the same as, the political ideology of bigness that is more familiar today. The intellectual roots of this second defense of bigness, however, are also in the social period—most prominently in Ronald H. Coase’s 1937 *The Nature of the Firm*.¹⁰¹ Largely unread at the time,¹⁰² the article was an effort to explain why economic transactions are often not coordinated through the price signals of the market but rather through the hierarchical and bureaucratic organization of the firm. Coase argued that his answer—that using markets involves costs—allowed him “to treat scientifically the determinants of the size of the firm.”¹⁰³ That is, he

95. Schragger, *supra* note 83, at 1072.

96. See National Industrial Recovery Act, Pub. L. No. 73-67, 48 Stat. 195 (1933) (repealed 1935).

97. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

98. See Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1423–27 (1993). Brandeis, I should add, was broadly supportive of unions. Still, he advocated for more cooperative relations made possible by applying principles of “diversity . . . decentralization, financial and territorial, with protective federations”—measures he thought would help keep conflicts small and manageable. BASKERVILLE, *supra* note 76, at 295–97.

99. EDWARD A. PURCELL, *BRANDEIS AND THE PROGRESSIVE CONSTITUTION* 38 (2000).

100. See Michel C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 292–93 (1998).

101. R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

102. See R.H. Coase, *The Nature of the Firm: Influence*, 4 J. LAW, ECON. & ORG. 33, 33 (1988).

103. Coase, *supra* note 101, at 394.

predicted that firms should “expand until the costs of organising an extra transaction within the firm become equal to the costs of carrying out the same transaction by means of an exchange on the open market or the costs of organising in another firm.”¹⁰⁴ For Coase, how such costs are calculated and compared depends on complex temporal and social factors. “Changes like the telephone and the telegraph,” he explained, “which tend to reduce the cost of organising spatially will tend to increase the size of the firm. All changes which improve managerial technique will tend to increase the size of the firm.”¹⁰⁵ But the basic point was that firms should expand up and until there are “diminishing returns.”¹⁰⁶ This idea would provide an intellectual foundation of our contemporary legal defense of “efficient monopolies” left unconstrained by a diminishing and deregulatory state.¹⁰⁷

In the 1930s and 1940s, however, Brandeis did not lose to Reagan-style neoliberalism and its policies of concentrated private wealth. Rather, he lost to Keynesian politics of World War II recovery, which established a regulated market economy, the near complete integration of industry and agriculture,¹⁰⁸ and a welfare state fueled by state interventions to support mass consumption.¹⁰⁹ Indeed, some Keynesians argued that mass consumption—enabled and required by mass production—would itself promote democratic and egalitarian values by distributing purchasing power as widely as possible.¹¹⁰

In the following decades, this postwar vision of the social good came to embody development.¹¹¹ The United States exported its own trajectory of mass production, distribution, and consumption in highly material form: in the case of food, first through food aid and then through “Green Revolution” technologies, a high-intensity approach to farming including seeds and pesticides produced by American industries.¹¹² But for much of the world, this developmental trajectory would not be clear-cut. Indeed, in the early 1970s, the second food regime ended in crisis around the same time that Kennedy dates as the end of the social in law.¹¹³

D. The Collapse of the Second Food Regime and the Rise of Contemporary Legal Thought

Two world problems marked the collapse of the second food regime: that of

104. *Id.* at 395.

105. *Id.* at 397.

106. *Id.* at 395.

107. RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 22 (1976).

108. McMichael, *supra* note 62, at 271.

109. *See* COHEN, *supra* note 92.

110. *Id.* at 55. Lizbeth Cohen describes the complex effects of a growing mass-consumption economy that redistributed access and opportunity and yet benefitted the middle class more than the working class, men more than women, and whites more than African Americans.

111. *Id.*

112. Friedmann, *supra* note 20, at 243.

113. Kennedy, *supra* note 1, at 62 (dating the end of the social period as approximately 1968).

hunger and of free trade. As we shall see, both these problems and their solutions were articulated in the language of contemporary legal thought.

Hunger first. In many developing economies, urbanization outpaced industrialization. As a result, the number of people who needed to purchase imported wheat outnumbered those who could afford to do so.¹¹⁴ In 1972 and 1973, world markets for wheat based on American subsidies unraveled when the United States sold an enormous amount of grain to the Soviet Union as part of détente, depleting its supplies.¹¹⁵ As a result, the price of wheat more than tripled.¹¹⁶ Spikes in oil prices a year later increased cost of food even further, compelling developing countries dependent on imports to borrow money from private banks.¹¹⁷ “Suddenly,” Friedmann argues, “billions of people were defined as ‘food insecure.’”¹¹⁸

In response, in 1974, the U.N. Food and Agriculture Organization called a World Food Summit. But when representatives of 135 nation-states gathered in Rome, they did not discuss the problems of markets, let alone the problems of public and private concentration in them, but rather the idea that people lacked food.¹¹⁹ The summit framed the solution to hunger in the language of *rights*—namely, an “inalienable right to be free from hunger and malnutrition”—and it created an International Undertaking on World Food Security.¹²⁰ It is to this moment, Friedmann observes, that we can trace our current dominant discursive ideas of a right to food and food security.¹²¹

At the same time, agribusiness corporations, which had vastly increased in power and transnational scale during the second food regime, desired greater trade liberalization. They “found themselves constrained by the mercantile trading rules and domestic subsidies of the [second food] regime.”¹²² Moreover, European countries had adopted protectionist policies and, with surpluses themselves, began to compete intensely with the United States for export markets.¹²³ As competition increased, export subsidies could no longer

114. Friedmann, *supra* note 13, at S272.

115. *Id.* at S249–50, S272.

116. Friedmann, *supra* note 20, at 244.

117. *See id.* at 244–45.

118. *Id.* at 245.

119. *Id.*

120. *See Universal Declaration on the Eradication of Hunger and Malnutrition*, ¶¶ 1, 12 U.N. Doc. E/CONF. 65/20 (1974).

121. Friedmann, *supra* note 20, at 245. Of course, the right to food has earlier roots, appearing first in the Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. DOC. A/RES/217(III) at art. 25 (1948) (Dec. 10, 1948) [hereinafter *Universal Declaration on the Eradication of Hunger and Malnutrition*], and then in the International Covenant on Economic, Social and Cultural Rights, GA Res. 2200, U.N. DOC. A/RES/21/2200 at art. 11 (Dec. 16, 1966). But its discursive reach expanded significantly with the 1974 World Food Summit and then the 1996 Rome Declaration on World Food Security, which declared food security a universal right. World Food Summit, Rome, It., Nov. 13–17, 1996, *Rome Declaration on World Food Security and World Food Summit Plan of Action*, 1, WFS 96/3 (Nov. 13–17, 1996).

122. Friedmann, *supra* note 20, at 244.

123. *Id.* at 243, 245–46.

masquerade as aid.¹²⁴ In 1986, the United States, the Cairns Group, the European Community, and other wheat exporting countries began General Agreement on Tariffs and Trade (GATT) negotiations to include agriculture within formal legal trade agreements—negotiations that culminated in 1994 with the World Trade Organization (WTO) Agreement on Agriculture.¹²⁵

As agriculture was reconfigured as world trade, hunger was reframed as an increasingly privatized and internationalized problem. Early interpretations of the right to food within international organizations echoed ideas of the postwar social left. There were, for example, proposals for income redistribution to ensure that individual consumers could access food available via markets,¹²⁶ as well as proposals for states to ensure adequate supplies of commercial food at “reasonable prices.”¹²⁷ By the 1980s and 1990s, however, food security increasingly became a question of how individual households could increase their purchasing power by participating in markets, and how international markets could increase efficient supplies through free trade, technological innovation (including biotechnology), and comparative advantage.¹²⁸ For example, advocating on behalf of agribusiness interests, the United States in WTO negotiations argued that food security was “best provided through a smooth-functioning world market.”¹²⁹ This vision of food security recruits states and transnational legal institutions to establish and enforce legal rules enabling “free” markets, including strong protection for intellectual property rights such as patented seeds.

Both the human right to food and the corporate right to property are intelligible—indeed predictable—in the language of contemporary legal thought. According to Kennedy, contemporary legal thought revives classical legal thought with its emphasis on rights and formal logic (legal categories that Kennedy suggests were at a “historical low point” in the 1930s version of the social¹³⁰). This strand of contemporary legal thought, which Kennedy calls neoformalism, envisions “law as the guarantor of human and property rights and of intergovernmental order through the gradual extension of the rule of law, understood as judicial supremacy.”¹³¹ Its key unit of legal analysis, Kennedy

124. *Id.* at 245.

125. Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 410. Of course, despite the agreement, the United States and other countries in the global north have continued to provide commodity specific subsidies that mostly benefit large agribusiness. *See* Friedmann, *supra* note 20, at 246–47.

126. Friedmann, *supra* note 20, at 248, 261 n.15 (describing the position of the New International Economic Order).

127. *See* Universal Declaration on the Eradication of Hunger and Malnutrition, *supra* note 120, at (g); *see also* Madeleine Fairbairn, *Framing Resistance: International Food Regimes & the Roots of Food Sovereignty*, in *FOOD SOVEREIGNTY: RECONNECTING FOOD, NATURE & COMMUNITY* 15, 22–23 (Hannah Wittman et al. eds., 2010); Friedmann, *supra* note 20, at 248.

128. Fairbairn, *supra* note, at 127, at 24–26; McMichael, *supra* note 62, at 276–81.

129. McMichael, *supra* note 62, at 277 (citation omitted).

130. Kennedy, *supra* note 1, at 65–66.

131. *Id.* at 22.

argues, is identity—or rather members of marginalized identity groups—not the organized groups or classes of the social period nor even the atomized individuals and nation-states of classical legal thought.¹³² Thus, for example, when the right to food is presented in collective terms, it is often couched as a matter of cultural survival.¹³³ And multinational corporations themselves have adopted identity/rights discourse by transforming the ownership of property (such as patents and trademarks) “into a minoritarian identity and government regulation into the analog of discrimination by legislative majorities” (often by the legislatures in developing countries).¹³⁴

In addition to rights discourse, however, there is a second, and seemingly contradictory, trend in contemporary legal thought. Here, jurists and lawmakers think about law and legal technique not as the production of absolutist legal rules and rights but rather “as the pragmatic balancing of conflicting considerations.”¹³⁵ The analytic roots of this approach—which Kennedy calls “conflicting considerations” or “policy analysis”—are in the social.¹³⁶ But rather than purposefully shaping legal rules to advance a single or obviously desirable social end, this kind of policy analysis more modestly and pragmatically aims to balance among competing visions of the good, manage difference and uncertainty, and produce ad hoc compromises. In this mode, legal questions are subject to expert cost-benefit assessments, scientific studies, and public and private standard setting. Think, for example, of genetically modified foods. Against a minority of voices that called for an absolute ban on genetically modified organisms (GMOs) as an unjust form of agribusiness, we have a legal regime governed by instrumental cost-benefit calculations measuring social risk (typically, environmental and health risks, such as antibiotic resistance and allergic reactions).¹³⁷ Thus, on Kennedy’s map, two approaches to legal analysis—reconfigured elements of classical thought in the form of rights neoformalism *and* reconfigured elements of the social in the form of policy analysis—now coexist together.¹³⁸

132. *Id.* at 65–66.

133. For example, the Inter-American Court of Human Rights has developed jurisprudence that protects the collective property rights of indigenous people as a means of material and cultural survival including, fundamentally, producing and obtaining food. *See, e.g., Sawhoyamaya Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. of H. R. (ser. C) No. 146 ¶¶118, 120, 131, 132 (Mar. 29, 2006); *Yakye Axa Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 125 ¶¶131, 135, 140, 146, 147, 154, 155 (June 17, 2005); *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶¶ 140(f), 148, 149, 153 (Aug. 31, 2001).

134. Kennedy, *supra* note 1, at 67.

135. *Id.* at 22.

136. *Id.* at 22, 64.

137. *See generally* CHAIA HELLER, *FOOD, FARMS & SOLIDARITY: FRENCH FARMERS CHALLENGE INDUSTRIAL AGRICULTURE AND GENETICALLY MODIFIED CROPS* (2013).

138. Kennedy, *supra* note 1, at 63.

E. What Remains of the Social Today?

Let me conclude this part by summarizing how the social does and does not persist on Kennedy's map of contemporary legal thought. Kennedy identifies the presence of the social today in two distinct forms. The first form, as I have just suggested, is the transfiguration of the social into policy analysis, which is politically indeterminate. The second form is an independent or "left-over social" that when deployed "in the law of the market" is now discursively "almost always a progressive stance," and is characteristically expressed in the language of human rights (such as the human right to food).¹³⁹

Mostly gone in elite legal discourse today is the social emphasis on size and scale that in the hands of early social-era progressive legal reformers, such as Brandies, fueled arguments for economic democracy. Consider, once more, the case of GMOs. In the late 1990s, transnational activists campaigned intensely to ban GMOs as a threat to smallholder agriculture. They argued that GMOs undercut small farmer autonomy by making farmers dependent on large agribusiness for seeds and pesticides and by forbidding them from saving and sharing seeds, thus destroying community-scale relationships and local knowledge networks.¹⁴⁰ Against food security, small farmers' movements demanded food sovereignty—a term purposefully chosen to highlight the political-economic dimensions of smallholder agricultural production and trade, namely the idea that food provisioning should happen at a scale that allows for a meaningful amount of self-determination, self-reliance, and democratic control.¹⁴¹ In this sense, food sovereignty evokes populist and early social-era agrarian arguments about economic self-governance as its own political good.

Food sovereignty, however, is also a creature of its times; it draws on the rhetorical tools of contemporary legal thought. For example, the International Peasant's Movement, La Via Campesina, which introduced the term in the 1996 World Food Summit, describes food sovereignty as "the *right* of peoples . . . to define their own food and agriculture systems."¹⁴² That said, food sovereignty did not penetrate contemporary elite legal rights discourse. When rights claims enter GMO debates, the rights invoked tend to be consumers' rights to information and choice, not producers' rights to participatory self-determination.¹⁴³ Nor did food sovereignty penetrate elite legal policy analysis

139. *Id.* at 64.

140. See generally HELLER, *supra* note 137.

141. See *id.* at 264–69, 271.

142. See *What is La Via Campesina?*, LA VIA CAMPESINA (Feb. 9, 2011, 2:08 PM), <http://viacampesina.org/en/index.php/organisation-mainmenu-44> (emphasis added). Food sovereignty also includes the right of peoples "to protect and regulate domestic agricultural production and trade in order to achieve sustainable development objectives; to determine the extent to which they want to be self reliant; [and] to restrict the dumping of products in their markets." *Main Issues: Food Sovereignty and Trade*, LA VIA CAMPESINA (Sept. 2, 2003, 6:12 PM), <http://viacampesina.org/en/index.php/main-issues-mainmenu-27/food-sovereignty-and-trade-mainmenu-38/396-peoples-food-sovereignty-wto-out-of-agriculture>. See also Michael Fakhri & Nathan Bellinger, *The Intersection between Food Sovereignty and Law*, 26 A.B.A. NAT. RES. & ENV'T 2 (2013).

143. See generally Debra M. Strauss, *The Role of Courts, Agencies, and Congress in GMOs: A*

of GMOs, which remains focused on assessing and balancing risk to environmental and human health. Today, political fights about smallness and bigness—and with them normative arguments about smallholder production as a means to the ends of community, autonomy, and economic self-governance—are not readily articulated by American legal elites. As I explore in the following part, current efforts by legal scholars to revive a progressive program of political decentralization are a telling case in point.

II

CONTEMPORARY PROGRESSIVE DECENTRALISTS, DEMOCRATIC EXPERIMENTALISM, AND THE BIGNESS OF NEOLIBERALISM

In this part, I shift from an overarching legal-historical map of food production and distribution to a close examination of one contemporary decentralizing legal reform movement. I do so in order to illustrate how, among progressive “decentralist” legal academics today, ideas of size and scale are less relevant to reform markets than public sector institutions—an approach to social change that, as the following part argues, diverges markedly from the practices and aspirations of contemporary food activists.

A. Contemporary Progressive Decentralist Movements in Law

The last two decades of American legal thought have witnessed a proliferation of progressive legal reform projects that take scale seriously. These are projects dedicated to decentralizing political decisionmaking, lawmaking, and dispute resolution so that “the people themselves” can actively participate. Consider the growth of fields in law such as deliberative democracy,¹⁴⁴ extrajudicial progressive constitutionalism,¹⁴⁵ consensus-building,¹⁴⁶ new governance or democratic experimentalism,¹⁴⁷ as well as prominent progressive defenses of federalism.¹⁴⁸

However, as Schragger aptly observes, progressive contemporary legal

Multilateral Approach to Ensuring the Safety of the Food Supply Chain, 48 IDAHO L. REV. 267 (2012). Strauss extensively reviews U.S. litigation and state and federal regulation, which nearly always frame GMOs as a question of health and environmental safety and consumer choice. The exception that supports the rule is Dennis Kucinich’s failed attempts to pass the Genetically Engineered Technology Farmer Protection Act “to ensure fairness for farmers and ranchers in their dealings with biotech companies that sell genetically engineered seeds, plants, or animals” and to mitigate “abuses” that threaten farmers’ market access and the survival of family farms. See Genetically Engineered Technology Farmer Protection Act, H.R. 3555, 112th Cong. (2011).

144. See, e.g., Carrie Menkel-Meadow, *The Lawyer’s Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347 (2004).

145. For an overview, see Amy J. Cohen & Michal Alberstein, *Progressive Constitutionalism and Alternative Movements in Law*, 72 OHIO ST. L. J. 1083 (2011).

146. See, e.g., Lawrence E. Susskind, *Consensus Building, Public Dispute Resolution, and Social Justice*, 35 URB. L.J. 185 (2008).

147. See, e.g., Dorf & Sabel, *supra* note 100; William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 47 WM. & MARY L. REV. 127 (2004).

148. See, e.g., Heather K. Gerken, *Supreme Court Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010).

scholars are typically interested in decentralization as projects of political democracy, defined narrowly to exclude economic life.¹⁴⁹ This is the case, I should stress, even as some of these scholars have criticized the antidemocratic effects of large corporations. These criticisms are characteristically expressed as condemnation of legal rules, such as those announced in *Citizens United v. Federal Election Commission*, that treat corporations (and unions) analogously to individuals with First Amendment rights to influence political elections through spending.¹⁵⁰ Daniel Tokaji, for example, argues that *Citizens United* undermines “an egalitarian vision of democracy.”¹⁵¹ But notice how he develops this claim: “Various types of federal and state laws help both individuals and corporations amass wealth. That is not to suggest that there is anything wrong with such laws. The problem. . .[is] that corporations [will] use their wealth in the political sphere, giving have-a-lots greater influence on election results.”¹⁵² Legal arguments for retrenching corporate power in electoral politics are quite different from arguments about the conditions necessary to create democratic forms of economic, and hence, political life.¹⁵³

Indeed, Tokaji’s affirmation of legal rules that allow corporations to expand in size and power in the “economic sphere” represents, in Kennedy’s terms, the revival and reconfiguration of classical legal thought—a set of ideas, Kennedy explains, that when deployed today *in the market* represent a view of law as neoliberal ideology.¹⁵⁴ As a principle to regulate markets, neoliberalism privileges a Coasian ideal of efficiency as well as the formal equality of all market actors, and it celebrates the individual entrepreneur by her capacity to innovate at an ever-expanding scale.¹⁵⁵ It also aims to configure market exchange without jurisdictional or geographical limits or bounds.

This is an evolution in law that scholars have traced quite clearly in the

149. Schragger, *supra* note 83, at 1084–85.

150. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

151. Daniel P. Tokaji, *The Obliteration of Equality in American Campaign Finance Law: A Trans-Border Comparison*, 5 J. PARLIAMENTARY & POL. L. 381, 382, 393 (2011).

152. *Id.* at 389.

153. See also William H. Simon, *Social-Republican Property*, 38 UCLA L. REV. 1335 (1991). In 1991, Simon observed that “American legal culture tends to treat property ownership largely as a constraint on politics and not as a prerequisite to political participation,” and thus it neither defends minimum access to property for the poor nor capital constraints for the wealthy on political/citizenship grounds. *Id.* at 1354. Against what he called classic liberalism—a view of democracy that confines “norms of equality and participation . . . to a narrowly defined sphere of government”—Simon defended a social-republican view of democracy that conditions property ownership on community participation (such as in cooperatives) and that imposes restraints on accumulation in order to limit inequality among community members. *Id.* at 1335–36.

154. Kennedy, *supra* note 1, at 64. In his contribution to this issue, Christopher Tomlins describes neoliberalism as the unifying logic of our contemporary legal moment. Christopher Tomlins, *The Presence and Absence of Legal Mind: A Comment on Duncan Kennedy’s Three Globalizations*, 78 LAW & CONTEMP. PROBS., nos. 1–2, 2015 at 1. In this article, I view neoliberalism as the overwhelmingly dominant American approach to market regulation, but with Kennedy, not as hegemonic of all of contemporary legal thought.

155. Think, in colloquial terms, of Nixon’s Secretary of Agriculture, Earl Butts who told farmers to “get big, or get out.” See Michael Carlson, *Obituary: Earl Butts*, THE GUARDIAN, February 4, 2008.

context of antitrust—where, in the words of Barak Orbach, “size is not a concern.”¹⁵⁶ Orbach is describing our now dominant interpretations of antitrust law, espoused most famously by Robert Bork and Richard Posner, in an effort “to dispel any remaining anti-bigness shadows from American competition laws” associated with social-era jurists like Brandeis.¹⁵⁷ In the 1970s and 1980s, Chicago school economists and legal scholars argued that the public interest is best served, not via a market comprised of many competitive smaller or medium-sized firms, but rather via a regulatory regime that allows market-dominant firms to expand, provided that this configuration maximizes the total surplus value generated across an economy.¹⁵⁸ Indeed, from this perspective, if prices are competitive, firms may consolidate until only three remain.¹⁵⁹ This efficiency argument functions today as a powerful defense of bigness even if, as Orbach argues, the neoliberal legal position does not have any a priori commitments to size.

Or, to put the point another way, progressive decentralist legal scholars tend not to directly challenge the neoliberal consensus on market size or scale as a primary organizing principle for economic activity, even as they argue for enhanced forms of democratic participation and self-determination in legal and political institutions. (Although several such scholars, to be sure, would condition genuine political participation on secondary forms of economic redistribution such as public provisioning of housing, childcare, welfare, and a minimum wage.)

One of the most complex and puzzling examples of this tendency among progressive decentralist legal scholars is democratic experimentalism—a legal reform project pioneered by Charles Sabel, Michael Dorf, and William Simon, among others.¹⁶⁰ In Kennedy’s terms, democratic experimentalists desire a reconstructed version of the social: they wish to institutionalize conflicting-considerations policy analysis outside of traditional and hierarchical legal forums. Indeed, for them, a basic problem in American law is that we have inherited a centralized legal regime from the New Deal and postwar social period in which rules are enacted from above to create inflexible administrative bureaucracies. In place of command and control administration, these scholars aim to revitalize political decentralization and local forms of democratic cooperation. Lawmakers, they argue, should enact general rather than specific rules. And “stakeholders,” rather than passively following these rules, should participate actively and collaboratively in elaborating, revising, and implementing them.¹⁶¹

156. See Barak Orbach, *The Antitrust Curse of Bigness*, 85 S. CAL. L. REV. 605, 608 (2012).

157. *Id.* at 608; ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978); see also POSNER, *supra* note 107.

158. See generally, COLIN CROUCH, *THE STRANGE NON-DEATH OF NEOLIBERALISM* (2011) (ch. 3: “The Corporate Takeover of the Market”).

159. *Id.* at 60.

160. See, e.g., Dorf & Sabel, *supra* note 100; Simon, *supra* note 147.

161. For a summary of some of the core commitments of democratic experimentalism, see Amy J.

Schragger reads democratic experimentalism like other contemporary decentralizing trends in law. He writes:

There are legal scholars who urge us to recover the reformist aspects of decentralization. A number of local government scholars, for example, have sought to reinvigorate local government as a constitutional ideal At the same time, Charles Sabel and Michael Dorf have encouraged a "Constitution of Democratic Experimentalism," in which decentralized government plays a significant role in generating innovative and testable policy programs, a "new form of government" that enables "citizens . . . to utilize their local knowledge to fit solutions to their individual circumstances." *But these proposals rarely speak in terms of economic deconcentration, and mostly ignore the connections between political and economic decentralization.*¹⁶²

Schragger's argument—that democratic experimentalism mostly ignores the connections between political and economic decentralization—is perhaps understandable on the face of Dorf and Sabel's 200-plus-page text.¹⁶³ But here is what makes democratic experimentalism both so puzzling and complex: it is hard to think of a contemporary progressive decentralist legal scholar with a *more* developed and nuanced defense of smallholder democracy than Sabel. In the remainder of this part, I set forth some of his early arguments in order to illustrate the kinds of political-economic and scalar claims that progressive decentralist legal scholars today rarely express. In the following part, I illustrate how food activists inherited some of Sabel's early ideas even as these ideas mostly disappeared from decentralist movements in law.

B. The Second Industrial Divide

In 1984, Sabel, along with the labor economist Michael Piore, published *The Second Industrial Divide*—an influential and controversial book that traces the rise and decline of mass manufacturing between approximately 1870 and 1960 in the United States (and in several comparative cases) over three historical periods that correspond roughly to both Kennedy's as well as Friedmann and McMichael's maps.¹⁶⁴ Strikingly, Piore and Sabel argued that the late-nineteenth-century shift from craft to mass production did not reflect the economic superiority of the mass industrial model as much as extant political interests and market power.¹⁶⁵ In place of mass production, Piore and Sabel

Cohen, *Producing Publics: Dewey, Democratic Experimentalism, and the Idea of Communication*, 9 CONTEMP. PRAGMATISM 143 (2012); Amy J. Cohen, *Governance Legalism: Hayek and Sabel on Reason and Rules, Organization and Law*, 2010 WIS. L. REV. 357 (2010); Amy J. Cohen, *Negotiation, Meet New Governance: Interests, Skills, and Selves*, 33 LAW & SOC. INQUIRY 503 (2008).

162. Schragger, *supra* note 83, 1084–85 (emphasis added) (quoting Dorf & Sabel, *supra* note 100).

163. Dorf & Sabel, *supra* note 100.

164. PIORE & SABEL, *supra* note 7. Like Kennedy and Friedmann and McMichael, Piore and Sabel write from a perspective that is both transnational and comparative; but, again, I focus my redescription on the United States.

165. *Id.* at 37–38. They write further:

[T]he technological possibilities that are realized depend on the distribution of power and wealth: those who control the resources and the returns from investment choose from among the available technologies the one most favorable to their interests. . . . [H]istory suggests that—under different circumstances—the craft sectors could have played a stronger role in

would resuscitate a (mechanized) version of craft production—in their words “flexible specialization”—alongside a political philosophy of democracy based on nineteenth- and early-twentieth-century smallholder and yeoman ideals.¹⁶⁶

The arguments about flexible specialization that Piore and Sabel developed in *The Second Industrial Divide* present a vision of smallholder democracy that is tailored to contemporary times. These arguments also remain a core justification for democratic experimentalism today, albeit in a rather different way.¹⁶⁷ For both of these reasons, it is worth fleshing out the book’s central claims.

At the core of the book is a distinction between mass and craft production. In mass production, semiskilled workers use special-purpose and product-specific machines to produce standardized goods.¹⁶⁸ Because workers are subordinated to machines, they are easily governed by top-down mechanisms of control: management promulgates narrow and inflexible rules to define work tasks and entitlements.¹⁶⁹ By contrast, in craft production, skilled workers use general multipurpose equipment to produce a more diverse family of small-batch goods.¹⁷⁰ Because human skill remains key to productivity, labor and management relations are more collaborative and include criteria of worker merit and self-determination.¹⁷¹

These two visions of economic and social organization, Piore and Sabel argued, require different kinds of markets and hence different kinds of public and private regulation in order to exist. In mass production, economies of scale and narrow workplace rules create both efficiencies and rigidities. Expensive special-purpose tools lower production costs and increase the volume of standardized goods. But they also limit the ability of mass producers to adjust to decline or variation in demand—both because fixed costs are high and because neither the tools nor the rigidly organized workers can be easily reprogrammed to new tasks.¹⁷² As such, mass production requires macroeconomic rules and policies that generate stable mass markets in which consumption is matched to production.¹⁷³ (This was precisely the logic that in agriculture influenced the Agricultural Adjustment Act and then decades of American food aid policy.)

By contrast, when markets are saturated, uncertain, or unstable, craft

economic development.

Id.

166. *Id.* at 18.

167. See, e.g., William H. Simon, *The Organizational Premises of Administrative Law*, 78 LAW & CONTEMP. PROBS. nos. 1–2, 2015 at 61; William H. Simon, *Toyota Jurisprudence: Legal Theory and Rolling Rule Regimes*, in LAW AND NEW GOVERNANCE IN THE EU AND THE US (Gráinne de Búrca & Joanne Scott eds., 2006).

168. PIORE & SABEL, *supra* note 7, at 4.

169. *Id.* at 113–15.

170. *Id.* at 5.

171. *Id.* at 115–20, 278.

172. *Id.* at 49–51.

173. *Id.* at ch. 4 (“Stabilizing the Economy”).

production or “flexible specialization” offers more microlevel self-correcting mechanisms and efficiencies.¹⁷⁴ Workers can reorganize to produce new product lines using general tools unconstrained by large capital costs. And they do not need to rely on the state to sustain markets for their goods. The regulatory problem they confront, however, is that firms may respond to instability and consumer variation through price competition achieved by sweating labor and cheapening materials, and hence undermine the conditions for innovation.¹⁷⁵ Flexible specialization therefore requires “the creation, through politics” of state- and community-based regulatory institutions that exempt wage and price reduction from competition.¹⁷⁶ Such institutions and rules would, in turn, enable firms to compete “through the innovation of products and processes” and, to that end, also collaborate by sharing information, skills, and technology.¹⁷⁷ Thus, Piore and Sabel argued, had “craft production prevailed, we might today think of manufacturing firms as linked to particular communities.”¹⁷⁸

Craft production, however, lost out due to a series of political and regulatory choices that helped to entrench mass production over time. In the United States, the shift from craft to mass production—our first industrial divide—happened under a regime of laissez-faire governance characteristic of classical legal thought. Between the 1870s and 1920s, large corporations were left mostly unconstrained by state regulation to coordinate supply and demand.¹⁷⁹ But because the economy had become “extremely sensitive to the level of consumer purchasing power,” self-stabilization through firm-level regulation alone proved insufficient to surmount the shocks of the Great Depression and the declining wages that followed it.¹⁸⁰ Indeed, Piore and Sabel submitted that “the fundamental cause” of the Depression “was the structural fragility of the economy that was associated with the rise of the mass-production corporation.”¹⁸¹ Sustaining a mass-production economy, they argued, requires macroeconomic regulation of economic activity to coordinate supply and demand—hence, the Keynesian policies of the New Deal and postwar social period that took industrial, domestic, and international form. For example, Keynesian policy measures included labor and minimum-wage legislation and especially “pattern bargaining,” a form of collective bargaining that linked

174. *Id.* at 17.

175. *Id.* at 263.

176. *Id.* at 17, 30, 270.

177. *Id.* at 30, 283, 298.

178. *Id.* at 6.

179. *Id.* at 15 and ch. 3 (“The Corporation”). To manage problems such as overproduction and instability in levels of consumer demand, corporations deployed strategies such as “segmentation,” that is, retaining a stable demand for themselves and leaving more risky variable demand for small producers. They also stabilized their own markets by requiring large customers to enter into long-term futures contracts. In addition, they developed various forms of vertical integration that enabled them to vary the amounts of inventory they put on the market; for example, sugar refineries developed networks of warehouses to manage price fluctuations in raw sugar. *Id.* at 56–59.

180. *Id.* at 77.

181. *Id.* at 75.

wages to the cost of living and increases in national productivity.¹⁸² They also included increased social welfare and military spending,¹⁸³ as well as the Bretton Woods System that established predictable exchange rates tied to the U.S. dollar.¹⁸⁴ These regulatory structures helped maintain a stable mass economy until the 1970s when the world witnessed a crisis of mass production. The causes were numerous and complex, but what was clear, Piore and Sabel insisted, was that the postwar regulatory system had failed to prevent a crisis within mass industrial capitalism¹⁸⁵—thus our second industrial divide and another moment of political choice.¹⁸⁶

C. Flexible Specialization and Smallholder Democracy

In response to the second industrial divide, Piore and Sabel outlined a vision for the future that would revive “an older conception of the polity” by combining flexible specialization with “yeoman democracy.”¹⁸⁷ In their words:

We need to examine the ideas and industrial communities of the nineteenth-century American artisans, and of their heirs among the Populists, the twentieth-century craft workers, and even some modern unions. The small-holder democracy that these people have practiced and defended shows a way to reconcile individual autonomy . . . with the restricted competition that is essential for flexible specialization.¹⁸⁸

The contemporary smallholder democracy that Piore and Sabel envisioned would take root in “industrial districts” comprised of small and medium firms linked together via “an ethos of interdependence among producers in the same market” and by the use of fair ways to compete.¹⁸⁹ These forms of collaboration and competition would be maintained, in turn, by familial and community ties and institutions as well as by regional public social welfare systems that supply, for example, finance, vocational training, and marketing information.¹⁹⁰

Of course, for Piore and Sabel, as for other decentralist reformers, scale and size did not represent their own ends. Rather, they stood for particular social and economic relations—here, ones that allow workers sufficient autonomy, security, and egalitarian opportunity to respond nimbly and creatively to market demand. On this view, flexible specialization could be achieved by very large corporations comprised of federated smaller work groups that operate

182. *Id.* at 79–82.

183. *Id.* at 89–91.

184. *Id.* at 107–11.

185. They included: rises in the prices of oil and wheat; the collapse of fixed exchange rates; deregulatory measures that undercut the postwar system of wage determination; and the saturation of domestic markets for consumer durables and new variation in consumer demand. *Id.* at ch. 7 (“The Mass-Production Economy in Crisis”).

186. *Id.* at 252.

187. *Id.* at 18, 305.

188. *Id.* at 18.

189. *Id.* at 265–67, 272.

190. *Id.* at 273–76. “Among the ironies of the resurgence of craft production,” they argued, “is that its deployment of modern technology depends on its reinvigoration of affiliations that are associated with the preindustrial past.” *Id.* at 275.

effectively along craft lines.¹⁹¹ At the same time, however, Piore and Sabel offered an intrinsic, even moral, case for a different organization of work in contemporary life—one that depends on “solidarity and communitarianism.”¹⁹² As Sabel wrote in an earlier book about industrial districts in Italy:

If you had thought so long about Rousseau’s artisan clockmakers at Neuchatel or Marx’s idea of labour as joyful, self-creative association that you had begun to doubt their possibility, then you might, watching these craftsmen at work, forgive yourself the sudden conviction that something more utopian than the present factory system is practical after all.¹⁹³

Piore and Sabel thus layered arguments about the potential efficiencies of decentralized flexible production onto arguments about the kinds of political, economic, and social arrangements that enable workers to live meaningful, creative, and self-determined lives.

To that end, Piore and Sabel did not rely simply on firm-level and technological change to determine relations between capital and labor, let alone transform societies. To the contrary, they made clear that flexible specialization could unfold on the ground in more or less egalitarian ways.¹⁹⁴ Ensuring more egalitarian economic and social relations, they suggested, requires not only a reorganization of labor and adversarial shop-floor control but also a *state* that is “responsible for creating conditions conducive to a republic of small holders.”¹⁹⁵ This is a state—and especially reinvigorated forms of local and regional government—that “must guarantee that market transactions do not permanently advantage one group of traders—and thus undermine the basis of the balance of wealth and power that makes possible a community of producers.”¹⁹⁶ In such a political regime, property would *not* be used “to the maximum advantage of its possessor” but rather “held in trust for the community—its use . . . subordinated to the latter’s maintenance.”¹⁹⁷ In other words, Piore and Sabel sketched a future where flexible specialization would both enable and require a particular progressive vision of political economy—one that embodies democratic community, a multiplicity of producers, collective individualism, and a redistribution of property rights. This vision has identifiable antecedents in the periods of classical and social legal thought but is

191. *Id.* at 267–68. Although large corporations can “serve as the organizational frame of flexible production,” Piore and Sabel also argued that this model “is not the most promising one for the United States.” *Id.* at 300.

192. *Id.* at 278.

193. CHARLES F. SABEL, *WORK AND POLITICS* 220 (1982).

194. PIORE & SABEL, *supra* note 7, at 307. In their words:

We have seen examples of flexible specialization in which property was widely distributed and authority regarding investments broadly shared; but we have also seen examples in which the workers had autonomy at the work place, yet the managers (ultimately responsible to private investors) held control over the fundamental economic decisions.

Id.

195. *Id.* at 305.

196. *Id.* at 301, 305 (emphasis added).

197. *Id.* at 305. For a richly argued account of this view of private property, see Simon, *supra* note 153.

without many prominent defenders in contemporary American law.¹⁹⁸

D. Democratic Experimentalism and Contemporary Law

So what happened to this vision of political economy in democratic experimentalism? In the decade following the publication of *A Second Industrial Divide*, Sabel translated his work on the economy and the firm into a decentralist legal reform project that coalesced around his 1998 *A Constitution of Democratic Experimentalism* coauthored with Michael Dorf (and referenced by Schragger above¹⁹⁹). Although flexible specialization anchored the article's ideas, Sabel's emphasis had shifted. He and Piore concluded *A Second Industrial Divide* by proposing that the state could "coordinate the necessary rearrangement of relations among firms, and between labor and capital—and thereby redefine the relation between government and economy."²⁰⁰ He and Dorf opened *A Constitution of Democratic Experimentalism* by offering the new firm as a model for state reform.²⁰¹

To that end, Dorf and Sabel began with a narrative familiar from *A Second Industrial Divide*. The rise of large-scale mass production, they explained, generated centralized and hierarchical regulatory institutions that both mirrored and served to regulate the corporate form.²⁰² This partnership between the state and the market held steady until the mid-1970s when the global economy encountered a crisis of standardized mass production. Firms, especially in Japan, surmounted the crisis by transforming themselves into federations of flexible work groups engaged in learning by monitoring, benchmarking, continuous adjustment, root-cause analyses, and just-in-time production.²⁰³ In the 1990s, Dorf and Sabel continued, American firms adopted similar techniques—even though they were not subject to similar state regulatory restrictions, such as lifetime employment, thought to have enabled flexible specialization in Japan.²⁰⁴ Dorf and Sabel viewed this "rapid diffusion" of flexible specialization across diverse contexts optimistically. It suggests, they argued, that actors in numerous and very different "settings are sure enough of the limitations of organizations premised on bounded rationality and mass production" to reorganize themselves along more open, decentralized lines.²⁰⁵

Significantly, Dorf and Sabel proposed that the techniques deployed in

198. Cf. James Q. Whitman, *Consumerism Versus Producerism: A Study in Comparative Law*, 117 YALE L.J. 340 (2007) (describing how, unlike in the United States, policies designed to support market access for producers continue to influence the capitalist legal systems in continental European countries such as Germany and France).

199. Schragger, *supra* note 83, at 1084–85.

200. PIORE & SABEL, *supra* note 7, at 306.

201. Dorf & Sabel, *supra* note 100, at 267.

202. *Id.* at 292.

203. *Id.* at 286–88, 297–306.

204. *Id.* at 297, 305–08. This meant that firms could not lower costs via layoffs but rather had institutional incentives to retrain their workers. *Id.* See also PIORE & SABEL, *supra* note 7, at 161; Simon, *supra* note 153, at 1402.

205. Dorf & Sabel, *supra* note 100, at 312.

these new firms—what they call the “pragmatist disciplines”—can *themselves* slowly transform social relations “in the course of [their] operation.”²⁰⁶ In their words:

learning by monitoring “politicizes” the economy by introducing a kind of workplace democracy. Group deliberation in benchmarking, simultaneous engineering, and error detection become central to all decisions . . . In obliging disputatious yet collaborative evaluation of how diverse potential products will be used in life, of conflicting ways of making them, and of the contrasting measures of corporate and individual performance, learning by monitoring strips from economic decisionmaking the veiling technicity of maximization of profits given prices, and thus distributes authority from the “rulers” to the “people.”²⁰⁷

Dorf and Sabel thus redescribed the flexible specialized firm as a pragmatic practice and set of deliberative techniques that establish a model for workplace democracy—a model that they extrapolated apart from social and political conditions and variability (and, it would appear, apart from unegalitarian instantiations of flexible specialization on the ground²⁰⁸). They then applied this pragmatist model to argue for the transformation of “*political* institutions in the form of democratic experimentalism.”²⁰⁹ These include regulatory and public service institutions (for example, family support services, community policing, military procurement, and nuclear and environmental regulations) as well as branches of government (courts, Congress, and administrative agencies). The article, in turn, spawned a range of similar proposals in public education,²¹⁰ prisons,²¹¹ child welfare services,²¹² drug courts,²¹³ and public land and water management.²¹⁴ Democratic experimentalism had thus become a program of public-sector reform.

I cannot speculate why Sabel, as he constructed democratic experimentalism, pursued his own deep insights about the mutual conditioning of the economy and polity in a mostly one-sided way—so that the new corporation became a model to decentralize the state while the role of the state in decentralizing the market receded from the project. But for this issue on

206. *Id.* at 308.

207. *Id.* at 313.

208. Labor law scholars argue that flexibility norms have mostly eroded, not advanced, worker security, welfare, and solidarity while enhancing employer control. See Kerry Rittich, *Making Natural Markets: Flexibility as Labour Market Truth*, 65 N. IRELAND LEGAL Q. 323 (2014).

209. Dorf & Sabel, *supra* note 100, at 313 (emphasis added).

210. Brandon L. Garrett & James S. Liebman, *Experimentalist Equal Protection*, 22 YALE L. & POL’Y REV. 261 (2004); James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183 (2003).

211. Charles F. Sabel & William H. Simon, *Destablization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004).

212. Kathleen G. Noonan, Charles F. Sabel & William H. Simon, *Legal Accountability in the Service-Based Welfare State: Lessons from Child Welfare Reform*, 34 LAW & SOC. INQUIRY 523 (2009).

213. Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts & Emergent Experimentalist Government*, 53 VAND. L. REV. 831 (2000).

214. Bradley Karkkainen, *Collaborative Ecosystem Governance: Scale, Complexity, and Dynamism*, 21 VA. ENVTL. L.J. 189 (2001).

contemporary legal thought, I can observe the ways in which democratic experimentalism exemplifies its era. As Kennedy argues, the social-era model of society as comprised of different organized groups and of the state as coordinating their coexistence has—in the contemporary legal moment—disappeared.²¹⁵ With it has also mostly disappeared the normative idea that law should regulate markets to protect multiple kinds of producers from “unfair” competition—or, in Sabel’s terms, the idea that the state should mediate among different configurations of wealth and power in order to facilitate a community of producers—rather than, for example, to ensure maximally efficient prices or nondiscrimination on the basis of protected identities. In this way, we can understand democratic experimentalism, as Schragger does, as one of several contemporary progressive decentralist movements that invests its primary legal and political energy into democratizing the institutions not of the market but of the state.²¹⁶

At the same time, however, the “ideal of yeoman democracy”—the legacy that Sabel argued is mostly likely to motivate the transformation of the American economy²¹⁷—continues to persist as cultural and political capital among social conservatives and liberals.²¹⁸ Indeed, a recent poll reports that a significant majority of Americans prefer smaller businesses to larger ones.²¹⁹ Moreover, this smallholder ideal is perhaps nowhere more visible than in agriculture itself. To this day, the American state provides extension services, tax benefits, subsidized credit, and debt relief to farmers, in ways that still offer some preferential treatment for smaller farms.²²⁰ These efforts have not prevented massive consolidation in food production and distribution, but they

215. Kennedy, *supra* note 1, at 67.

216. Within the democratic experimentalist project, Sabel has remained interested in the scalar regulation of the economy but this interest is in the background of the work. See, e.g., Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 69 (2011) (suggesting that conventional regulatory tools such as cost-benefit analysis and cap-and-trade miss the ways in which “publicly subsidized technical assistance may be needed to induce small- and medium-sized producers to adopt socially desirable practices and to protect them from the competitive disadvantages that they might suffer vis-à-vis larger producers as a result of regulations requiring technologically complex responses”).

217. PIORE & SABEL, *supra* note 7, at 306.

218. An important point, but one beyond the scope of this article, is the uneasy alliance—I would venture scalar tensions—between American neoliberalism, with its commitments to efficiency and market rationality in all spheres of life, and neoconservatism, with its moral valorization of family and religious loyalty that tends to honor the small business, family-scale enterprise, and local commerce. On the contradictions and powerful overlaps of this alliance, see Wendy Brown, *American Nightmare: Neoliberalism, Neoconservatism, and De-Democratization*, 34 POL. THEORY 690, 698 (2006).

219. PUBLIC AFFAIRS COUNCIL, PUBLIC AFFAIRS PULSE SURVEY: AMERICANS’ VIEWS ON BUSINESS IN AN ELECTION YEAR 17–18 (2012).

220. See, e.g., SUSAN SCHNEIDER, FOOD, FARMING, AND SUSTAINABILITY 14, 41 (2010) (discussing sections in federal farm bills and in the bankruptcy code that provide greater financial assistance to small farmers); see also Steven C. Bahls, *Preservation of Family Farms—the Way Ahead*, 45 DRAKE L. REV. 311 (1997) (surveying state laws that restrict corporate ownership of agricultural land as well as measures in federal tax law, bankruptcy law, and farm programs designed to protect the interests of small farmers).

have led some contemporary legal scholars to argue for the obliteration of the remaining traces of scale-sensitive protection for small farms and firms in American law.²²¹

In the final part of this article, I identify new kinds of yeoman ideals influencing alternative food movements today. These movements present themselves as antidotes to mass industrialized food by seeking to relocalize, respatialize, and re-embed food in particular geographical spaces and moral and social relations. The normative commitments of these movements include particular restrictions on size, scale, and social organization—commitments that help to produce their alternative politics and uneasy relation to contemporary law.

IV

A CHALLENGE FOR CONTEMPORARY LEGAL THOUGHT?: ARTISANAL CHEESE AND FAIR TRADE TOWNS

To return to Friedmann and McMichael's historical narrative, our current food regime is characterized by the intensive consolidation and corporatization of food production and distribution.²²² Indeed, nearly sixty percent of food and beverages sold in the United States is controlled by "the ten largest U.S.-based multinational corporations."²²³ Moreover, policy analysts "predict that it is not unrealistic to imagine future global markets in which the sale of food is controlled by four to five global firms with a handful of regional and national companies."²²⁴ This economic concentration was made possible in part by the relaxed antitrust law and enforcement of the late 1980s and 1990s that enabled a series of mergers and acquisitions among large processors and retailers.²²⁵ It was also facilitated by the rise of flexible-specialization technologies in large corporations that were not subjected to the restricted competition, social protections, and collaborative regulatory infrastructure that Piore and Sabel initially envisioned.²²⁶

221. See, e.g., Jim Chen & Edward S. Adams, *Feudalism Unmodified: Discourses on Farms and Firms*, 45 *DRAKE L. REV.* 361, 376, 431 (1997). Among their most pressing concerns are insufficient standards to regulate (often minority) labor on smaller farms.

222. Friedmann calls the present moment a corporate-environmental food regime. Friedmann, *supra* note 24, at 251. McMichael calls it the corporate food regime. McMichael, *supra* note 62, at 273.

223. Thomas A. Lyson, *Civic Agriculture and the North American Food System*, in *REMAKING THE NORTH AMERICAN FOOD SYSTEM: STRATEGIES FOR SUSTAINABILITY* 19, 21 (Clare Hinrichs & Thomas A. Lyson eds., 2007).

224. OLI BROWN WITH CHRISTINA SANDER, *SUPERMARKET BUYING POWER: GLOBAL SUPPLY CHAINS AND SMALLHOLDER FARMERS* 1 (2007).

225. Lyson, *supra* note 223, at 20-22; see also Ronald W. Cotterill, *Continuing Concentration in Food Industries Globally: Strategic Challenges to an Unstable Status Quo*, 49 *FOOD MKTG POL'Y CTR. RES. REP.* 1, 1 (1999); Ronald W. Cotterill, *Mergers & Concentration in Food Retailing: Implications for Performance & Merger Policy*, 2 *FOOD MKTG POL'Y CTR. RES. REP.* 1, 1 (1989).

226. As a case in point, consider retail chains—widely considered the most powerful and oligopolistic actors in food systems today. In the 1970s and 1980s, American and European retailers developed highly responsive and flexible tracking systems that they used to calibrate increasingly casualized labor practices quite precisely to fluctuations in consumer demand. See Amy J. Cohen,

But Friedmann and McMichael, like Kennedy, suggest that our current moment does not embody a single totalizing logic as much as contradiction, contestation, and opposing forces.²²⁷ For them, the hegemony of corporate industrial food (including its relentless integration of alternative food trends such as organic²²⁸) now sits alongside new forms of counter-hegemonic resistance. In McMichael's words, "the corporate food regime embodies the tensions between a trajectory of 'world agriculture' and cultural survival, expressed in the politics of 'food sovereignty.'"²²⁹

Indeed, despite corporate intensification over food-supply chains—or perhaps because of this intensification—it is hard to think of another arena of everyday life where people as regularly express opposition to large-scale industrialization and aspirations for alternative forms of capitalist production and exchange. As Julie Guthman writes,

As an activist movement, the alternative-food movement is one of the most successful of our day if you consider the numbers of people who identify with it by shopping at alternative-food institutions, attending events, contributing money, and providing countless hours to gardening projects, farm-to-school programs and "hanging out" with food.²³⁰

Although it is challenging to get precise data, food scholars have widely observed the recent uptick in farmers' markets, community-supported agriculture, community gardens, consumer cooperatives, alternative food stores, and place-based and values-based labels.²³¹ To be sure, these developments encompass a range of social values including health, wellness, and environmental protection. But they also increasingly express a core principle of food sovereignty: namely, that small producers and consumers should make democratic decisions about food provisioning in particular social and geographical spaces.²³²

Supermarkets in India: Struggles over the Organization of Agricultural Markets and Food Supply Chains, 68 U. MIAMI L. REV. 19, 24–29 (2013).

227. See Philip McMichael, *A Food Regime Genealogy*, 36 J. PEASANT STUD. 139, 148–54 (2009) (debating whether there is a third distinctive food regime that has fully consolidated).

228. See, e.g., JULIE GUTHMAN, *AGRARIAN DREAMS: THE PARADOX OF ORGANIC FARMING IN CALIFORNIA* 51–53 (2004) (describing the production of organic food on small and large farms disconnected from social movement activism and fair labor practices).

229. McMichael, *supra* note 62, at 274.

230. JULIE GUTHMAN, *WEIGHING IN: OBESITY, FOOD JUSTICE, AND THE LIMITS OF CAPITALISM* 143 (2011).

231. See, e.g., Lyson, *supra* note 225, at 28 (reporting, among other trends, a thirty-five percent increase between 1992 and 2002 of the number of farms selling directly to the public). As of 2007, the U.S. Department of Agriculture reports 4385 farmers' markets and 12,549 farms selling via community supported agriculture (CSA) arrangements. See *Farmers Markets and Local Food Marketing*, U.S. DEP'T OF AGRIC., <http://www.ams.usda.gov/farmersmarkets/facts.htm> (last visited Jan. 9, 2015); *Community Supported Agriculture*, U.S. DEP'T OF AGRIC., <http://www.nal.usda.gov/afsic/pubs/csa/csa.shtml> (last visited Jan. 9, 2015). See also Michael Pollan, *The Food Movement, Rising*, N.Y. REV. BOOKS, June 10, 2010, available at <http://www.nybooks.com/articles/archives/2010/jun/10/food-movement-rising/>.

232. See Philip McMichael, *Food Sovereignty in Movement: Addressing the Triple Crisis*, in *FOOD SOVEREIGNTY*, *supra* note 127, at 168.

Why food accomplishes this kind of expressive social work is an intriguing question. Perhaps it is because people's relationships to food, unlike their relationships to the production and consumption of durable goods, are organized around continuous and repetitive practices: purchasing, cooking, serving, eating, if not also producing, processing, and trading it. "Foodways," as Jakob Klein, Johan Pottier, and Harry West observe, "therefore are profoundly entangled with 'lifeways.'"²³³ The repetitive labor of food, in other words, is constitutive of self and social relations and, as such, "motivates action."²³⁴ It is also the case that "[e]ven today, more than half of the world's population derives a living from food-related work."²³⁵ Understood from this perspective, food is a potent symbolic and material practice of everyday life and thus a powerful tool to reimagine relations of community and economy.

In this final part, I offer two examples of such American reimagining: artisanal cheese production and scalar debates within the U.S. fair trade movement. My first example describes food producers themselves who combine the pursuit of exchange value with the pursuit of other kinds of values, including small-scale craft production as its own ideal of local development. My second example is briefer; it touches on how fair trade activists aim to create particular ethical relations of market exchange that preserve market access for a multiplicity of local producers (where localism itself is a contested economic space). Some of these actors go much further in their defense of smallholder production than Sabel. For them, smallness—including particular kinds of structural limits to expanding in size—is valued as its own means to achieving the ends of democratic self-government, local development, and economic citizenship, even when these ends are not directly tethered to expanding efficiency and productivity. To that end, the actors I describe embody some of Brandeis's smallholder ideals. But they are not engaged in similar efforts to create a national jurisprudential and legislative architecture of economic decentralization. Rather than a politics aimed at creating state institutions that foster and coordinate widespread and macrolevel change,²³⁶ artisanal cheese makers and fair trade activists offer a politics grounded primarily (indeed, purposefully) in the possibility of transformative social and economic relations in particular places and networks of exchange—albeit ideally in relations that can be replicated in many other spaces.²³⁷ It is a politics of the local and the small that, for the most part, is only indirectly expressed in the language of

233. Jakob A. Klein, Johan Pottier & Harry G. West, *New Directions in the Anthropology of Food*, in 2 THE SAGE HANDBOOK OF SOCIAL ANTHROPOLOGY 299, 302 (Richard Fardon et al. eds., 2012).

234. BRAD WEISS, THE MAKING AND UNMAKING OF THE HAYA LIVED WORLD 128 (1996).

235. Klein et al., *supra* note 233, at 302.

236. Cf. Charles Sabel, *Dewey, Democracy, and Democratic Experimentalism*, 9 CONTEMP. PRAGMATISM 35, 41–42 (2012) (criticizing industrial districts for the absence of federated governance structures that connect localities and foster learning among them).

237. Crisinta Grasseni suggests that the metaphor used among many radical food activists "is that of the strawberry field . . . to indicate a mission to proliferate while maintaining small scale, expanding into neighboring terrains." Cristina Grasseni, *Reinventing Milk and Cheese in Italy, between Re-localization and Co-production*, GASTRONOMICA (forthcoming 2015).

contemporary law.

A. Artisanal Cheese and Taste of Place

Today, there are more than 450 enterprises that handcraft cheese in the United States—a number that has more than doubled since 2000.²³⁸ Many of these artisanal producers use raw milk to make their cheeses.²³⁹ As Piore and Sabel would predict, artisanal versus industrial cheese production embody very different forms of knowledge and skill, as well as processes of variability and uncertainty. Briefly described, the aim of industrial cheese making is to maximize standardization and predictability.²⁴⁰ Milk pooled from multiple sources is pasteurized and homogenized (that is, made consistent in protein and fat content). Because pasteurization eradicates both pathogenic and beneficial microbes, industrial milk is then reseeded with commercially produced bacteria necessary for cheese production.²⁴¹ By contrast, “artisan cheese makers embrace—even celebrate—some degree of variability.”²⁴² Indeed, the microbes that cultivate artisanal cheese may include mold spores from cave walls or straw mats where the cheese is left to age.²⁴³ Thus Harry West explains that the process of artisanal cheese production fluctuates with changes in raw materials seasonally, daily, and sometimes even “from morning milking to afternoon milking,”²⁴⁴ and hence requires, in Piore and Sabel’s terms, highly flexible and self-regulating labor.

For many artisanal raw-milk cheese makers, it is the know-how and self-mastery necessary to manage this variability that fuels their alternative agrifood politics. To ensure both safety and quality, artisan producers must maintain sufficient control over the entire process. Cleaning, for example, is highly skilled labor because it enables cheese makers to help beneficial microbes outcompete any pathogens that might be present.²⁴⁵ “If you want to properly clean a certain surface,” one cheese maker explains, “you need so much percentage of soap and so many minutes—if you approach it like that . . . it’s doing something necessary and productive.”²⁴⁶ As such, many artisanal cheese

238. HEATHER PAXSON, *THE LIFE OF CHEESE: CRAFTING FOOD AND VALUE IN AMERICA* 3 (2013). See also Heather Paxson, *Locating Value in Artisan Cheese: Reverse Engineering Terroir for New-World Landscapes*, 112 AM. ANTHROPOLOGIST 444, 445 (2010).

239. Heather Paxson, *Post-Pasteurian Cultures: The Microbiopolitics of Raw-Milk Cheese in the United States*, 23 CULTURAL ANTHROPOLOGY 15, 41 n.1 (2008) (reporting that 85 percent of artisanal cheese makers in Vermont, 65 percent in New England, and 50 percent nationwide work with raw milk).

240. Harry G. West, *Thinking Like A Cheese: Towards an Ecological Understanding of the Reproduction of Knowledge in Contemporary Artisan Cheese Making*, in UNDERSTANDING CULTURAL TRANSMISSION IN ANTHROPOLOGY: A CRITICAL SYNTHESIS 320, 321 (Roy Ellen et al. eds., 2013).

241. *Id.*

242. *Id.* at 322.

243. *Id.*

244. *Id.*

245. Paxson, *supra* note 239, at 33.

246. *Id.* at 33.

makers argue that “raw-milk cheese is a value-added food that . . . cannot be successfully absorbed by industry giants; at a scale larger than artisan, a farmer would have many people working for him or her, thereby losing direct control over production quality.”²⁴⁷ Likewise, some argue that a clean, safe milk supply requires pastured animals raised on hay rather than on fermented corn (silage), similarly limiting the possibility of industrial cooptation.²⁴⁸ Thus precisely what makes raw-milk cheese of political significance to small producers is likely what would make it appear marginal to legal reformers with aspirations for macrolevel policy change: namely, that artisanal control means that there are structural limits to scaling up its production.

To be clear, these cheese makers know well that restricting raw milk and cheese production to a small artisanal scale does not itself ensure safety or quality. Rather, size and scale stand for particular economic and social relations (as well as commitments to quality) that they must actively nurture and protect.²⁴⁹ Thus, although artisanal cheese makers regularly link their arguments about small-scale production to instrumental concerns about risk, more for them is at stake. As anthropologist Heather Paxson observes,

When producers . . . argue that raw milk production should be restricted to small-scale operations, they want to secure a symbolic connection between raw milk and small farmers . . . as a means of sustaining their farms and revitalizing rural communities and economies. They want to see raw-milk cheese become a cornerstone of a “civic agriculture.”²⁵⁰

Civic agriculture is a term coined by the influential rural sociologist Thomas Lyson to advocate for decentralized practices of food production linked to local development and community identity.²⁵¹ Lyson, in turn, modeled it in part on Piore and Sabel’s proposals for industrial reform. “The civic agriculture perspective,” Lyson explains, “favors smaller, well-integrated firms/farms cooperating with each other The ideal form is the production district, similar to the industrial district notion mentioned earlier (Piore and Sabel 1984). Producers share information and combine forces to market their products.”²⁵² As Paxson observes, many artisanal cheese makers likewise describe small-scale raw-milk cheese production as a practice of economic and social citizenship grounded in place-based development and mutual aid.²⁵³

247. *Id.* at 32.

248. *Id.* at 40.

249. PAXSON, *supra* note 238, at 60–62.

250. Paxson, *supra* note 239, at 35.

251. See THOMAS A. LYSON, CIVIC AGRICULTURE: RECONNECTING FARM, FOOD, AND COMMUNITY 1–2 (2004).

252. Lyson, *supra* note 225, at 25. Lyson writes further, “The state supports these economic ventures by ensuring that all firms have access to the same resources such as information, labor, and infrastructure.” See also LYSON, *supra* note 251, at 75. Other contemporary food scholars also use *The Second Industrial Divide* as inspiration for alternative models of agriculture. See, e.g., Amy Guptill & Rick Welsh, *Is Relationship Marketing an Alternative to the Corporatization of Organics? A Case Study of OFARM*, in FOOD AND THE MID-LEVEL FARM: RENEWING AN AGRICULTURE OF THE MIDDLE 55, 61–64 (Thomas A Lyson et al eds., 2008) (describing a “second agricultural divide”).

253. Paxson, *supra* note 238.

One of the ways the idea of civic agriculture is expressed among cheese makers is through conversations about *terroir* or “taste of place”²⁵⁴—where “place,” Paxson clarifies, refers “to the material conditions of a locale—soil, topography, and microclimate—and also to the cultural know-how behind agricultural products that help constitute ‘place’ as a locus of shared custom and affective belonging.”²⁵⁵ *Terroir* has a long history in French law influenced by social-era ideas of corporatism and regionalism. And, as we shall see, it lacks a meaningful analogue in contemporary American law.

Briefly described, in the first decade of the twentieth century, French law granted legal status to wine “that had an association with a region that was ‘local, loyal, and constant.’”²⁵⁶ In 1935, legislation designed to “protect *terroir*” was revised to include quality-based criteria for production, and the regime grew to include cheese, honey, and agricultural products such as olive oil and potatoes.²⁵⁷ Significantly, only groups of producers—not individuals or corporations—could apply for collective property designations known as *appellation d’origine controlee* (AOC).²⁵⁸ As Amy Trubek and Sarah Bowen explain, “from its very inception, the AOC system has rewarded the *collective* agency of a group of producers.”²⁵⁹ In this way, Trubek makes clear, “the rules and regulations of the AOC system *guarantee* the possibility of local control, thus keeping the knowledge and the power in the hands of the growers, the vintners, and others in each agricultural region.”²⁶⁰ Today, the AOC system also requires producer groups to respect “the essential principles of ‘representivity’ and ‘democracy.’”²⁶¹

To be sure, as a legal and cultural category, *terroir* can generate struggles and inequalities as different groups and actors vie to benefit from collective property designations.²⁶² But it has also provided the basis for formidable

254. AMY B. TRUBEK, *THE TASTE OF PLACE: A CULTURAL JOURNEY INTO TERROIR* (2008).

255. Paxson, *supra* note 238, at 444.

256. TRUBEK, *supra* note 254, at 26.

257. *Id.* at 27–29.

258. *Id.* at 26, 28–29.

259. TRUBEK, *supra* note 254, at 29; Amy B. Trubek & Sarah Bowen, *Creating the Taste of Place in the United States: Can We Learn from the French?*, 73 *GEOJOURNAL* 23, 25 (2008). See also Sarah Bowen & Ted Mutersbaugh, *Local or Localized? Exploring the Contributions of Franco-Mediterranean Agrifood Theory to Alternative Food Research*, *AGRIC. HUM. VALUES* (2013) (explaining that the European “regions with the greatest concentration of [geographical indicators] are frequently characterized by strong, long-standing collective producer organizations”).

260. TRUBEK, *supra* note 254, at 31.

261. Trubek & Bowen, *supra* note 259, at 25. The French AOC system, moreover, “now serves as the basis for the European Union’s policies on Protected Denomination of Origins (PDO) and Protected Geographical Indications (PGIs).” *Id.* at 24.

262. See, e.g., Sarah Bowen, *Development from Within? The Potential for Geographical Indications in the Global South*, 13 *J. WORLD INTELL. PROP.* 231 (2010) (illustrating how influential market actors have manipulated the geographical indication standards for tequila against the interests of smaller producers and the environment); see also Cristina Grasseni, *Developing Cheese at the Foot of the Alps*, in *REIMAGINING MARGINALIZED FOODS: GLOBAL PROCESSES, LOCAL PLACES* 133 (Elizabeth Finnish ed., 2012).

collective action. For example, in 1999, the United States placed a sanction on European agricultural exports, including on the AOC-designated French Roquefort cheese, after the European Union refused to comply with a WTO decision requiring it to lift its ban on hormone-treated U.S. beef.²⁶³ In response, members of local sheep-milk associations, along with a powerful smallholders' agricultural union, engaged in a widely publicized (although mostly symbolic) effort to dismantle a McDonald's. Farmers painted the slogan: "McDo out, Roquefort in!"²⁶⁴ As one union member put it, "We tried to make it clear: it was industrialized agriculture against local artisanal agriculture."²⁶⁵

Terroir is thus a powerful cultural as well as legal concept that is "difficult to translate"²⁶⁶—although it often is translated by American legal practitioners as simply a kind of regional characteristic. As a regional characteristic, *terroir* becomes connected to geographical indications—place-based labels that, in the United States, are a form of intellectual property rights protected under the federal trademark system, and function simply "as brands, preserving reputation and truth in labeling."²⁶⁷ The United States has also enacted federal legislation enabling geographical designations for wine production,²⁶⁸ but these can be owned by any individual or corporate entity without regards to "a cooperative system of governance or the specification of culturally-sensitive or environmentally-sustainable production methods."²⁶⁹ In other words, in the United States, geographical indications are understood apart from scalar and social concerns such as artisanal standards of production, cooperative ownership, and democratic forms of governance and local control.

Paxson reports that American artisanal cheese makers discuss *terroir* in ways that diverge both from American legal categories as well as from French cultural and geographical ones. Many American small cheese producers view as

263. Appellate Body Report, *European Communities Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) (adopted Feb. 13 1998); see also Christopher Ansell & David Vogel, *The Contested Governance of European Food Safety Regulation*, in WHAT'S THE BEEF? THE CONTESTED GOVERNANCE OF EUROPEAN FOOD SAFETY 3 (Christopher Ansell & David Vogel eds., 2006).

264. See HELLER, *supra* note 137, at 187–97.

265. *Id.* at 190 (quoting José Bové, a member of the Confédération Paysanne). See also JOSÉ BOVÉ & FRANÇOIS DUFOUR, *THE WORLD IS NOT FOR SALE: FARMERS AGAINST JUNK FOOD* (2001).

266. Amy B. Trubek et al., *Produits du Terroir: Similarities and Differences Between France, Québec and Vermont 2* (Univ. of Vt., Food System Research Collaborative, Opportunities for Agriculture Working Paper Series vol. 1, no. 2).

267. Laura Zanzig, *The Perfect Pairing: Protecting U.S. Geographical Indications with a Sino-American Wine Registry*, 88 WASH. L. REV. 723, 725 (2013). The United States created geographical indications, and then treated them as a subset of trademark law, in order to comply with TRIPS Agreement requirements. See generally the Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 22, Apr. 15, 1994, 1869 U.N.T.S.299; 15 U.S.C. §1054 (1999). See also Ruth L. Okediji, *The International Intellectual Property Roots of Geographical Indications*, 82 CHI.-KENT L. REV. 1329, 1333 (2007). Several scholars have criticized this conceptual collapse. See, e.g., Dev Gangjee, *Quibbling Siblings: Conflicts Between Trademarks and Geographical Indications*, 82 CHI.-KENT L. REV. 1253, 1267 (2007).

268. 27 C.F.R. §9.1 (establishing viticultural areas).

269. Trubek & Bowen, *supra* note 259, at 29.

disingenuous a precise claim to regional distinctiveness that consumers can discern via taste.²⁷⁰ Unlike French practice, American artisanal cheese making often does not stretch back in particular regions over any length of time; instead, new entrepreneurs are trying to refabricate artisanal cheese practices suited to the land they have (what one calls “reverse-engineering *terroir*”).²⁷¹ These small producers certainly recognize the exchange value of *terroir* as an intangible marketable commodity; but “to many U.S. cheese makers, the notion is bankrupt if it is nothing but a label legitimating high retail prices.”²⁷² For them, *terroir* does or should stand not only for exchange value but also for value-based civic ideals that include local stewardship, the transmission of artisanal know-how, and solidaristic forms of place-based development. As one cheese maker put it, “We’re working here with the concept of *terroir*, and that’s local grass.”²⁷³ Local grass, Paxson explains of this usage, means not only that the cheese will feature the flavors of animals fed on local pastures. Buying grass from community producers also means money that stays “in town.”²⁷⁴ Another told Paxson: “I’m setting up a cheese guild,” where producers will share the costs for equipment and overhead but will have separate labels and businesses; “this little plant,” the cheese maker anticipated, “will be producing twenty-one hundred pounds of cheese a week but won’t be one sole proprietor getting bigger and bigger We will all be artisan.”²⁷⁵ Here *terroir* embodies a community of artisanal producers collaborating and competing but in ways designed to prevent the emergence of a permanently dominant one. Thus Paxson concludes that for American artisanal cheese makers, *terroir* is “a kind of place marketing, but one that . . . reflects a concerted effort to literally create the social and economic basis for claims of uniqueness” that producers may use to enlist consumers in expansive regional, national, even transnational networks of exchange.²⁷⁶

Significantly, artisanal cheese makers do not enlist state law to implement alternative standards for production, property ownership, or economic development. As Paxson describes it, the state is not particularly relevant to their food politics.²⁷⁷ At least not beyond their resistance to a legal regime, designed around industrial dairies, that regulates raw milk as “a potential biohazard.”²⁷⁸ Federal regulations, for example, require cheese makers to age

270. Paxson, *supra* note 238, at 449–50.

271. *Id.* at 451–52.

272. *Id.* at 449.

273. *Id.* at 452.

274. *Id.*

275. *Id.* at 451.

276. *Id.* at 452 (internal quotations omitted); *id.* at 453 (noting that “taste of place is not the same as taste of proximity”).

277. *Id.* at 447.

278. Paxson, *supra* note 239, at 16, 30–32. Paxson describes how cheese makers are creating alternative forms of social meaning and social relations generated against a “Pasteurian social order” established and maintained by the U.S. Food and Drug Administration.

raw-milk cheeses for at least sixty days and ban the sale of raw milk in interstate commerce for consumption.²⁷⁹ To be sure, activists have challenged raw-milk bans in court. But these efforts are typically articulated from the consumer perspective in the language of individual rights—for example, rights to privacy, travel, and choice. This is the case even for organizations, such as the Farm-to-Consumer Legal Defense Fund, explicitly committed to the interests of artisanal food producers.²⁸⁰

Of course, there are few alternative legal strategies to pursue: as Stephanie Tai recently observed, “existing legal avenues fail to mesh with the values of the sustainable food movement.”²⁸¹ Nor can producers access any sort of legal-administrative framework like the AOC that combines state-based advocacy for a community of producers with requirements for collaborative forms of production and control. Indeed, political scientist Jim Bingen describes recent unsuccessful efforts by food scholars and policy researchers to encourage the U.S. Department of Agriculture to transform geographic indications into strategies of rural development that promote democratic collective organization in the market and protection of smallholder interests by the state.²⁸²

That said, concerns with small-scale production have begun cropping up in legislative debates about food safety.²⁸³ Most prominently, the 2010 Food Safety Modernization Act included an (extensively debated) amendment designed to ease safety restrictions for small farmers. The amendment was based on the claim, in the words of its cosponsor Senator Jon Tester, that “family growers have more ‘eyeballs to the acre.’”²⁸⁴ Like artisanal cheese makers, proponents of

279. 21 C.F.R. §§133.182, 1240.61 (2014).

280. See, e.g., Plaintiffs’ Complaint for Declaratory, Preliminary and Other Injunctive Relief, Farm-to-Consumer Legal Def. Fund v. Sebelius, No. 5:10-CV-04018, (N.D. Iowa Feb. 20, 2010), 2010 WL 1868971 (challenging the federal ban on raw milk). See also generally DAVID E. GUMPert, THE RAW MILK REVOLUTION: BEHIND AMERICAN’S EMERGING BATTLE OVER FOOD RIGHTS (2009); KEEP FOOD LEGAL, <http://www.keepfoodlegal.org> (last visited Feb. 17, 2015).

281. Stephanie Tai, *The Rise of U.S. Food Sustainability Litigation*, 85 S. CAL. L. REV. 1069, 1070 (2012) (surveying recent anti-GMO and animal-welfare litigation).

282. Jim Bingen, *Labels of Origin for Food, the New Economy and Opportunities for Rural Development in the US*, 29 AGRIC. HUM. VALUES 543 (2012); Jim Bingen, *People, Place and Politics: Notes for Re-Inventing Food in US Regions*, paper presented at The Re-invention of Food, Radcliffe Institute for Advanced Studies, October 18–19 (2013). In his analysis of worker cooperatives, Simon puts the point in broader terms: “public efforts in the United States have been relatively insensitive to the possibilities of small-scale, locally-rooted, human-capital-intensive enterprise.” Simon, *supra* note 153, at 1402.

283. I should add that democratic experimentalists here speak subtly in the language of law and context. For example, Sabel and Simon have suggested that new legal regimes governing food safety—negotiated via broad-based stakeholder participation—can better contextualize risk based on qualitative distinctions among producers and thus achieve more rational regulatory standards. Charles F. Sabel & William H. Simon, *Contextualizing Regimes: Institutionalization as a Response to the Limits of Interpretation and Policy Engineering*, 110 MICH. L. REV. 1265, 1282 (2012) (describing the California Leafy Greens Products Handler Marketing Agreement and criticisms calling “for further contextualization, especially to accommodate small farmers”).

284. Helena Bottemiller, *Tester: Small Farmers Won with Food Safety Exemptions*, FOOD SAFETY NEWS, May 5, 2011. For key provisions of the amendment, see 21 U.S.C. § 350h(f)(1) (2012). But see Nicholas R. Johnson & A. Bryan Endres, *Small Producers, Big Hurdles: Barriers Facing Producers of*

the amendment deployed “scale-sensitive” arguments about risk and safety in order to advocate for a broader set of ideals about local economic development and democracy.²⁸⁵ Tester himself made some of these broader arguments explicit: “We deal with consolidation in our energy sector . . . in our banking sector, and we have consolidation in our food industry, too. The fact is that we need to not encourage that consolidation My amendment *protects the ability for farmers’ markets to flourish*”²⁸⁶ As my final brief example suggests, similar ideals have motivated the localization of fair trade—with perhaps more transparent efforts to recruit local lawmaking power.

B. Fair Trade and Fair Trade Towns

In the United States, fair trade is a billion-dollar retail business, but one marked by deep fissures around questions of size and scale, especially the organization of agricultural production.²⁸⁷ In October 2011, Fair Trade USA split from the Fair Trade Labeling Organization International, an umbrella organization that unites domestic certification organizations under a uniform label.²⁸⁸ Not unlike the French AOC regime, Fair Trade International certifies only coffee that is grown on farmer-owned cooperatives with democratic principles of self-governance.²⁸⁹ Certified cooperatives receive a minimum price for their crop and a premium based on a percentage of sales for social and economic development. Currently there are 360 certified cooperatives that produce more coffee than they can currently sell to fair trade buyers (suggesting there is no problem with undersupply).²⁹⁰

“Local Foods,” 33 HAMLINE J. PUB. L. & POL’Y 49, 91–97 (2012) (noting the lack of empirical evidence behind the “local food is safer” proposition).

285. See, e.g., *Food Safety Action Alert*, NATIONAL SUSTAINABLE AGRICULTURE COALITION, (Nov. 10, 2010), <http://sustainableagriculture.net/blog/food-safety-action-alert-2/>; see also *Critical Food Safety Vote on November 17*, FOOD DEMOCRACY NOW! (Nov. 16, 2010), <http://www.fooddemocracynow.org/blog/2010/nov/16/urgent-critical-food-safety-vote-nov-17th/>.

286. FDA Food Safety Modernization Act—Motion to Proceed, Congressional Record-Senate, November 18, 2010 at 38010. A similar set of scalar issues motivated 2013 revisions to Vermont’s Agricultural Housekeeping Bill to permit on-farm slaughter of a small number of animals for sale to consumers. See, e.g., *Farm Fresh Meat*, RURAL VERMONT, <http://www.ruralvermont.org/issues-main/ffmeat/> (last visited Feb. 17, 2015). See also Allison Condra, *Food Sovereignty in the United States: Supporting Local and Regional Food Systems*, 8 J. FOOD L. POL’Y 281, 304 (2012) (describing the Local Food and Community Self-Governance Ordinance of Sedgwick, Maine declaring “the right to produce, process, sell, purchase and consume local foods thus promoting self-reliance, the preservation of family farms, and local food traditions”).

287. In 2009, Fair Trade USA estimated its retail sales at \$1.2 billion. *Fair Trade Up, Charitable Giving Down*, FAIR TRADE USA (Nov. 17, 2010), available at http://fairtradeusa.org/press-room/press_release/fair-trade-charitable-giving-down.

288. Scott Sherman, *The Brawl Over Fair Trade Coffee*, THE NATION, Aug. 22, 2012.

289. See FAIRTRADE INTERNATIONAL, FAIRTRADE STANDARDS FOR SMALL PRODUCER ORGANIZATIONS, VERSION 1.05.2011_V.1.1 30 (2011), available at http://www.fairtrade.net/fileadmin/user_upload/content/2009/standards/documents/2012-07-11_SPO_EN.pdf. Fair Trade International restricts four commodities—coffee, cocoa, honey, and cotton—to smallholder cooperatives. See Daniel Jaffee, *Fair Trade Standards, Corporate Participation, and Social Movement Responses in the United States*, 92 J. BUS. ETHICS 267, 277 (2010).

290. Sherman, *supra* note 288, at 2.

Fair Trade USA, however, decided to certify coffee produced by waged farm workers on large plantations and by individual farmers, a decision widely perceived as an effort to appeal to the large-scale sourcing preferences of large corporations.²⁹¹ For many activists, this decision undercut the defining feature of fair trade—namely, to enable smallholder cooperatives to compete for market access. As Eric Holt-Giménez, Ian Bailey, and Devon Sampson have argued, fair trade means helping small farmers “grow not just their market, but their market power; not just their businesses, but their controlling share within the business.”²⁹²

This debate suggests broader tensions within contemporary economic development. In certifying plantation labor, Fair Trade USA promises vastly to expand the fair trade retail market and thus to advance the interests of the poor through principles of modest redistribution.²⁹³ Most significantly, it guarantees agricultural laborers on certified plantations a “right” to earn their national minimum wage—albeit a right that operates through voluntary participation in the market rather than through the coercion of nation-states.²⁹⁴ By contrast, activist opponents of Fair Trade USA’s decision privilege democratic smallholder cooperatives as an independent socioeconomic good. For example, Equal Exchange, the oldest fair trade coffee distributor in the United States, demands that the fair trade certification system protect cooperatives from large-scale corporate competition (even from competition by plantations “that sincerely do right by their workers”).²⁹⁵ To that end, they have lobbied the

291. See Sherman, *supra* note 288; Jaffee, *supra* note 289, at 277–78. For critiques of fair trade standards and policies designed in the interests of large corporations see Jaffee, *supra* note 289; Daniel Jaffee & Philip H. Howard, *Corporate Cooptation of Organic and Fair Trade Standards*, 27 AGRIC. HUM. VALUES 387 (2010).

292. Eric Holt-Giménez, Ian Bailey & Devon Sampson, *Fair Trade to the Last Drop: The Corporate Challenges to Fair Trade Coffee*, 24 LEISA MAGAZINE 19 (2008), available at <http://www.agriculturesnetwork.org/magazines/global/towards-fairer-trade/fair-to-the-last-drop-corporate-challenges-to>. See also Darryl Reed, *What Do Corporations Have to Do with Fair Trade? Positive and Normative Analysis from a Value Chain Perspective*, 86 J. BUS. ETHICS 3 (2009) (discussing how plantation certification stands to squeeze out small producers); A. Tucker, *Fair Enough?*, THE NEW INTERNATIONALIST, Nov. 2006.

293. Paul Rice, *Fair Trade USA: Why We Parted Ways with Fair Trade International*, TRIPLEPUNDIT (Jan. 11, 2012), <http://www.triplepundit.com/2012/01/fair-trade-all-fair-trade-usa-plans-double-impact-2015/>.

294. Fairtrade USA’s standards for plantation certification are currently under construction. *Fair Trade Standards*, FAIRTRADE USA, <http://fairtradeusa.org/certification/standards> (last visited Feb. 17, 2015). But they will likely approximate Fairtrade International’s standards, which require payment of a national minimum wage, the right to unionize, minimum safety conditions, and price premiums for a local development fund. FAIR TRADE STANDARD FOR HIRED LABOR, FAIRTRADE INTERNATIONAL (2014), available at http://www.fairtrade.net/fileadmin/user_upload/content/2009/standards/documents/generic-standards/2014-1-15_HL_EN_FINAL.pdf.

295. *Why Is Equal Exchange For Co-Ops And Against Plantations In The Fair Trade System?*, EQUAL EXCHANGE, <http://www.equalexchange.coop/about/fair-trade/faqs/why-equal-exchange-co-ops-and-against-plantations-fair-trade-system> (last visited Feb. 17, 2015). Fair trade activists against plantation certification are not indifferent to plight of agricultural laborers. To the contrary, many criticize standards based on a minimum rather than a living wage and the right to unionize rather than union representation. Jaffee, *supra* note 289, at 276. But see Sandy Brown & Christy Getz, *Towards*

largest American retailer of fair trade coffee to exit the Fair Trade USA system.²⁹⁶ They have also helped launch an alternative label—the Small Producers Symbol (SPP)—and have encouraged processors and retailers to participate in strengthening and expanding this cooperative agricultural model.²⁹⁷

This is not a simple debate. As anthropologist Sarah Lyon argues, “fair trade’s single most important limitation is its small market size.”²⁹⁸ For that reason, Fair Trade USA has formally adopted a scale-agnostic view on certification: for the sake of expanding its share of the retail coffee market, Fair Trade USA includes actors of various size and social organization provided that they meet a minimum set of social welfare requirements. But this scale-agnostic view also recalls the neoliberal position: if large actors consequently crowd out smaller ones, that is of secondary significance. By contrast, Equal Exchange explicitly privileges small-scale and decentralized workplaces as a necessary (albeit not sufficient) means of creating democracy and justice in economic life. Neither side has tried to engage state lawmaking processes in support of its scalar fair trade vision. But it seems clear that Equal Exchange’s rather Brandeisian commitments would be far more challenging to mobilize in contemporary legal form than would be a proposal to use the market to expand social entitlements to individual agricultural workers.

Lyon explores how fair trade activists have nonetheless begun to engage local lawmaking bodies. These activists, critical “of the movement’s co-optation by large-scale corporate interests,” have turned away from an exclusive focus on producer communities in developing economies and towards what J.K. Gibson-Graham calls a “global politics of local transformations.”²⁹⁹ They aim to enlist local governments in designating particular American communities as “fair trade towns” in order to cultivate alternative economic practices in the places “where they themselves live.”³⁰⁰

To that end, the fair trade town movement lobbies local governments to enact rules like this *Buy Local/Buy Fair* ordinance passed in 2008 by the city of Northampton:

The City of Northampton hereby establishes a *Buy Local/Buy Fair* policy to maximize purchase of locally produced, Fair Trade Certified, and/or fairly traded products from locally owned businesses in the process of procuring necessary goods for municipal

Domestic Fair Trade? Farm Labor, Food Localism, and the ‘Family Scale’ Farm, 73 GEOJOURNAL 11 (2008) (arguing that privileging “family scale” farms in fair trade policy may obscure the needs of agricultural laborers).

296. See, e.g., An Open Letter to Green Mountain Coffee Roasters from Equal Exchange: Please Leave Fair Trade USA (May 20, 2012), available at <http://equalexchange.coop/open-letter-green-mountain-coffee-roasters-equal-exchange>.

297. See SMALL FARMERS. BIG CHANGE, <http://smallfarmersbigchange.coop> (last visited Feb. 17, 2015).

298. Sarah Lyon, *Fair Trade Towns USA: Growing the Market within a Diverse Economy*, 21 J. POL. ECOLOGY 145, 148 (2014).

299. *Id.* at 149.

300. *Id.*

operations . . . ; and

As authorized under MGL Ch. 30B, Section 20, the City of Northampton hereby establishes a preference for products of agriculture grown or produced using products grown in the Commonwealth. . . .³⁰¹

There are currently thirty-two fair trade towns (and sixty-nine campaigns in progress),³⁰² often with uneasy relationships to Fair Trade USA.³⁰³ I have not discovered ordinances that reject the Fair Trade USA label. But activists now confront a different set of scalar questions. They must debate what localism means as a legal category of town and city governance. Is it a proximate geographical space or an aspiration for alternative forms of capitalist global exchange?³⁰⁴ One city official in Northampton proposed to blur the distinction: “the buy local, buy fair message is a very inclusive message: to embrace local farmers but also to embrace small farmers around the world.”³⁰⁵ Another fair trade town campaign in Vermont set clearer proximate priorities: “Buy local and when you can’t buy local buy fair.”³⁰⁶ The point I wish to stress, however, is that fair trade towns represent an explicit attempt to enlist legal power in the politics of relocalization (with all of its complexities and inequalities). But even here there is ambivalence and debate. Lyon reports that campaign leaders have proposed to recognize fair trade towns without formal legislative enactment.³⁰⁷

In 1989, Friedmann and McMichael concluded their history of food regimes by predicting that if renationalization was the protective movement of the past, “relocalization combined with global co-ordination may be the protective movement of our times.”³⁰⁸ My examples are microillustrations of this point—smallholder artisanal cheese production and fair trade towns represent a response to the mass industrialization of food that combine efforts to localize production and market exchange with value-based commitments that link these locations to communities of producers and consumers in many other spaces. But, compared to renationalization, these processes of relocalization engage far less with state law.

As we have seen, the renationalization of food happened during the social period. There, elite reformers actively recruited law to debate the organization of the economy along scalar and corporatist lines. The organization that prevailed—large-scale national industrialization—was made possible by a legal logic of social development that empowered planners confidently to assert that

301. City of Northampton, Buy Local/Buy Fair Resolution, (Apr. 17, 2008), *available at* <http://www.northamptonma.gov/DocumentCenter/View/872>.

302. *Fair Trade Towns*, FAIR TRADE CAMPAIGNS, <http://fairtradecampaigns.org/campaign-type/towns/> (last visited Feb. 17, 2015). The first fair trade town was established in 2005.

303. Lyon, *supra* note 298, at 153.

304. *Id.* See also Bowen & Mutersbaugh, *supra* note 259.

305. Lyon, *supra* note 298, at 155.

306. *Id.* (describing the rhetorical strategy of the campaign). See also Derrick Braaten & Marne Coit, *Legal Issues in Local Food Systems*, 15 DRAKE J. AGRIC. L. 9, 26, 29–31 (2010) (noting the rise of local agricultural sourcing requirements over the past five years).

307. Lyon, *supra* note 298, at 150 n.7.

308. Friedmann & McMichael, *supra* note 2, at 114.

they were using law to advance a single, desirable social end. National processes of industrialization, in turn, produced multinational food corporations with interests that did not necessarily overlap with the interests of states (or citizens). Here, again, law mattered a great deal. The contemporary revival of classical legal thought in the market helped to naturalize the power of multinational corporations with its commitment to the formal equality of all market actors constrained in their ability to expand only by a particular calculation of efficiency.

Against this configuration of corporate power, actors today are reimagining more spatialized and scale-sensitive markets within our global capitalist food economy.³⁰⁹ Fair trade coffee activists like Equal Exchange are reviving debates about whether size and scale are legitimate categories to articulate a social and economic, if not yet legal, vision of the good. To that end, they share with artisanal cheese makers the idea that social and economic policy should be concerned not only with growth, or even distribution, but also with the political-economic and scalar conditions that enable people to exercise a meaningful amount of democratic control over the conditions of their lives.³¹⁰ In both cases, we have seen early and experimental attempts to embed such processes of relocalization within practices of state power (such as the Food Safety Modernization Act Amendment and fair trade town ordinances). But the actors I described express their commitments to cooperative forms of smallholder production primarily in the language of mutual aid, voluntary exchange, and movement-based politics, and are only just beginning to consider whether and how to influence the institutions of contemporary law.

V

CONCLUSION

This article on contemporary legal thought weaves together several different temporal and conceptual threads. I began by redescribing influential metanarratives of law and food in order to illustrate how law shapes food systems and facilitates their transformation. I argued that by reading food regimes through Kennedy's three periods of legal thought, we can see how ideas of scale and size have functioned as legal arguments about the desirability of different kinds of market relations—arguments that have stood for a range of values including class-based activism, democratic forms of economic self-governance, and cooperative and decommmodified forms of economic production and that have been more or less compelling at different moments in time.

309. My examples are not efforts to upend capitalist global food systems but rather to create "alternative economic spaces . . . [and] operational logics" within them. DAVID GOODMAN, E. MELANIE DUPUIS & MICHAEL K. GOODMAN, *ALTERNATIVE FOOD NETWORKS: KNOWLEDGE, PRACTICE, AND POLITICS* 9 (2012).

310. There is some parallel here to the communitarian ideal of economic citizenship advanced by Michael Sandel. See MICHAEL SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* (1998) (especially ch. 8: "Liberalism and the Keynesian Revolution").

I then turned to the present and observed that there is growing interest among contemporary American legal scholars in the practices, techniques, and theories of decentralization. But this interest, I argued, enlists institutions not of the market but of the state. As a telling example, I described democratic experimentalism. Whereas contemporary food scholars have revived Sabel's critiques of mass industrial production to argue for alternative forms of smallholder agricultural production and exchange,³¹¹ among legal scholars, democratic experimentalism stands primarily for public sector reform. I thus suggested that a robust debate about democratizing markets is missing among progressive decentralists in law.

In the final part, I examined efforts to create alternative forms of capitalism that take seriously restrictions on the scalar conditions of production and exchange. In my two examples—artisanal raw-milk cheese production and fair trade towns—attention to size and scale gives rise to normative arguments, ones that are infused with particular solidaristic and ethically based values. It is not itself a legal consciousness in Kennedy's terms—that is, attention to size and scale is not a way “of conceiving of the legal organization of society” that is the common property of the left and the right and in which an infinite variety of regulatory and justificatory arguments are expressed.³¹² Rather, in my examples invocations of the local and the small represent ways in which ordinary people, living under late neoliberal conditions, are trying to create more ethical and democratic forms of market exchange that include market access for a multiplicity of producers. As such, alternative food movements are tapping into a broader popular consciousness, one that Mark Tushnet suggests that Americans today experience mostly as “discontent”—namely, the idea that “the concentration of economic power in transnational corporations . . . deprives United States citizens of important powers of self-governance.”³¹³

I want to conclude nonetheless by emphasizing that there is of course nothing intrinsically emancipatory about the local and the small. To the contrary, scalar construction is always politically complex. It is capable of reproducing as much as challenging existing inequalities and hierarchies as social and geographical boundaries are defined to include and exclude various actors and spaces on the ground.³¹⁴ In Julie Guthman's words: “eating local, organic, seasonal food that you prepared yourself may be pleasurable but it is

311. I should add: an important literature emphasizes the limits of industrial-agricultural comparisons (because of the unique features of food production and food markets) but its arguments are beyond the scope of this article. See, e.g., David Goodman & Michael Watts, *Reconfiguring the Rural or Forging the Divide*, 22 J. PEASANT STUD. 1 (1994); Ben Fine, *Towards a Political Economy of Food*, 1 REV. INT'L POL. ECON. 519, 533–38 (1994).

312. Kennedy, *supra* note 1, at 22–23, 63.

313. Mark Tushnet, *A Public Philosophy for the Professional-Managerial Class*, 106 YALE L.J. 1571, 1571 (1997).

314. See, e.g., E. Melanie DuPuis & David Goodman, *Should We Go “Home” To Eat?: Toward a Reflexive Politics of Localism*, 21 J. RURAL STUD. 359 (2005).

not universally so, nor is it tantamount to effecting social justice.”³¹⁵ Indeed, her own critical history of the organic movement in the United States includes analysis of how its commitments to size (privileging small versus large farms) became a commitment to *form* rather than to the “*processes* of social and ecological exploitation that gave rise to the organic critique in the first place.”³¹⁶ Nor is there anything intrinsically emancipatory about a state that prioritizes the interests of a multiplicity of producers—as James Whitman has shown such producerist systems have overlapped with a range of (socialist to fascist) political values.³¹⁷

I have used the analytical categories of size and scale as a theme throughout this article to make a more limited and descriptive point. Namely, to make visible the ways in which contemporary resistance to concentration in food markets has mobilized older ideas of smallness and bigness as normative categories of food production and distribution—ideas now stretched over changing contemporary configurations of (conceptual and territorial) local and global space. It is far from clear whether and how this resistance will succeed in democratizing power and, if so, with what distributional effects (on, for example, labor, class, gender, and family relations). But it is precisely for this reason that contemporary food activism presents an opportunity to reconstruct a left-legal analytics of size and scale. And perhaps, beyond an analytics, a set of political arguments about economic self-governance that can be cultivated from within the contradictory and unsynthesized tools of contemporary legal thought.

315. GUTHMAN, *supra* note 230, at 5. See also SUSANNE FREIDBERG, *FRESH: A PERISHABLE HISTORY* (2009).

316. GUTHMAN, *supra* note 228, at 12, 174–76.

317. Whitman, *supra* note 198, at 357–60.
